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IN THE

Supreme Court of the United States

October Term, 1959

No. 672

ROBERT J. GRUNDLER and JOSEPH LEONID JELLY,
Petitioners,

v.

THE STATE OF NORTH CAROLINA.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

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Robert J. Grundler and Joseph Leonid Jelly, your petitioners, pray that a writ of certiorari issue to review the judgment of the Supreme Court of North Carolina entered in the above-entitled case on November 11, 1959.

Opinions Below

The opinions of the Court below (Appendix A, *infra*, pp. 1a-24a), were reported in *State* v. *Grundler* and *State* v. *Jelly*, 251 N. C. 177, 111 S. E. 2d 1 (App. A, pp. 1a-20a) and in *State* v. *Grundler*, 249 N. C. 399, 106 S. E. 2d 488 (App. A, pp. 20a-24a).

The opinions of the New Hanover Superior Court (App. A, *infra*, pp. 25a-34a) were not reported.

Jurisdiction

The judgment of the Court below (App. B, *infra*, p. 35a) was entered on Nov. 11, 1959. No petition for re-

hearing is allowed in criminal cases by the State of North Carolina (App. C, *infra*, p. 36a). The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(3).

Constitutional Provision Involved

Constitution of United States, Amendment, Article XIV:

> "* * * No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Questions Presented

1. Is the trial of a capital case fatally infected with such an absence of fundamental fairness essential to the concept of Justice as to constitute a denial of due process under the Fourteenth Amendment to the United States Constitution, where on a consolidated prosecution of defendants, separately indicted for rape by force and violence, the following occurs:

   a. The Prosecutrix testifies to direct words of consent to intercourse, and the Court excludes evidence of prior specific acts of unchastity further bearing upon her consent to intercourse with defendants, as well as upon her credibility, while presenting to the Trial Jurors extensive and improper testimony of many police officers and public officials of specific instances of Prosecutrix' good character.

   b. The Court further admits extensive, improper, unnecessary and highly prejudicial testimony of police officers relating to police activities and investigations subsequent to the alleged offense.

   c. The case is submitted to the Jury upon clearly erroneous and prejudicial instructions, including instructions for fixing guilt upon either defendant for

the act or conduct of the defendant in the other indictment, a rule applicable in conspiracy cases.

"d. The Trial Court submits to the Jury a gross and highly prejudicial misstatement and characterization of defendants' contentions upon the vital issue of consent, and the Jury further indicates to the Trial Court a lack of understanding of the instructions on consent without thereafter receiving proper instruction thereon and the Trial Court charges the Jury in a manner calculated to excite, and destructive of the defendants' presumption of innocence.

2. Where a state provides a system of appellate court review, can proceedings before its courts be so conducted as a cloak merely to formalize constitutional requirements and by giving "lip service" to the right of appeal make an empty form of the due process of law guaranteed by the Fourteenth Amendment?

Statement of the Case

Petitioner Grundler was indicted by the Grand Jury of New Hanover County, State of North Carolina, charged that on or before February 1, 1958, with force and arms, he did unlawfully, willfully and feloniously ravish and carnally know Opral Morris, a female, by force and against her will (this is a capital offense in North Carolina). Petitioner Jelly was likewise separately indicted for the same offense (Vol. III, pp. 224, 225).[1]

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[1] Submitted with this petition are the following:

Vol. I—First appeal North Carolina Supreme Court filed August 1958 decided January 1959 (pp. 1-110).

Vol. II—Second Appeal North Carolina Supreme Court filed August 1959 decided November 1959 (pp. 1-75).

Vol. III—Petition for Writ of Certiorari North Carolina Supreme Court filed August 1958 decided November 1959 (pp. 1-357).

See Appendix D cross reference chart (App. D, p. 37a).

The two indictments were consolidated for trial, the Trial Court having refused to grant a motion for separate trial and both petitioners entered pleas of not guilty and were tried in the Superior Court, New Hanover County, North Carolina, before Judge Burgwyn and a jury. The trial started March 6, 1958 and the jury started deliberations the evening of March 7, 1958. During deliberations, the jury requested further instructions from the Court concerning the different verdicts it could render and an explanation of the first three or four, and whether or not there was a time limit that a case had to be reported to the authorities. The jury later also requested a definition of what "consent after assault is."

The facts indicate petitioner Grundler, twenty one years of age, a nonresident of the State of North Carolina, whose home was in New York, at the time was a United States Marine stationed at Camp Lejeune, North Carolina and had an exemplary record both in civilian and military life, and that petitioner Jelly, 22 years of age, also a non-resident of the State of North Carolina, whose home was in Massachusetts, also at the time was a United States Marine and had an exemplary record in civilian life.

That both petitioners on leave the evening February 1, 1958 visited the City of Wilmington, North Carolina by automobile. That they met two witnesses (Koniczny and Wenzell) who had just left the prosecutrix Opral Morris, after completing a date with her and who directed petitioners to prosecutrix at the Puritan Cafe. Petitioners entered the cafe, sat at a table for coffee, and petitioner Jelly, without intervention of petitioner Grundler, engaged her in conversation. She left the cafe escorted by petitioner Jelly and talking with him. Shortly thereafter, petitioner Grundler paid for the coffee, left the cafe alone, entered his car, passed petitioner Jelly and prosecutrix, and parked, listening to his car radio. It was snowing and the car windows were completely closed due to the snow and cold.

Petitioner Grundler's attention was diverted from his radio by the opening of the car door and the entering of petitioner Jelly and prosecutrix Morris, unaware that anything untoward had occurred. In fact, at the trial the Court ruled that anything that might have occurred or transpired prior thereto between petitioner Jelly and prosecutrix was not binding on petitioner Grundler (Vol. III, pp. 70, 71).

Petitioner Grundler drove his car out of Wilmington, directed to Kure Beach, a considerable distance, by the prosecutrix herself. Enroute, petitioner Jelly had sexual relations with the prosecutrix on the back seat, petitioner Grundler hearing no protest or other sound indicating want of consent of prosecutrix, force or violence, or anything indicative of lack of concurrence in the relations she had with petitioner Jelly.

Arriving at Kure Beach, petitioner Grundler *asked permission* to have intercourse with her and prosecutrix told petitioner Grundler she was willing and petitioner Grundler indulged on the back seat (Vol. III, p. 147).

Petitioner Grundler at no time attempted by word or deed to place prosecutrix in fear of him or subdue her and she offered no protest, resistance or reluctance to have intercourse with him and petitioner Grundler was completely unaware of any injury claimed to have been suffered by her. Prosecutrix was not paid any money, refused offer to be driven home and left the car at a requested point.

Petitioners on the way back to camp were stopped by a highway patrolman and petitioner Grundler voluntarily followed the patrol car back to Wilmington and freely admitted having intercourse with prosecutrix at Kure Beach and cooperated fully with the authorities (Vol. III, p. 180).

Following the alleged offense, the prosecutrix went to her home without seeking medical or hospital aid and with-

out making complaint to the police authorities, and upon being located at her home the following morning expressed amazement at the intervention of police authorities (Vol. III, p. 85). Police intervention had been brought about entirely from information from servicemen, that a girl had been struck and pushed into a car driven out of Wilmington that evening.

Prosecutrix, nineteen years of age, resided with a younger brother, claimed to be married to a serviceman overseas and concededly had been out with others. She claimed to have been struck by petitioner Jelly before entering the car and to have sustained a fracture of the jaw. The Court, upon objection at the trial, allowing such evidence to be offered only as against petitioner Jelly (Vol. III, p. 70) but later charging the jury to the contrary to the serious prejudice of petitioner Grundler (Vol. III, p. 222).

The record contains affirmative and positive testimony of the prosecutrix herself that petitioner Grundler asked permission to have sexual relations with her in just so many words without saying anything offensive to her and that she also expressed her consent clearly and orally and that at no time did petitioner Grundler use any force, violence, threats, intimidation or other coercive acts or conduct toward her. Prosecutrix testified (Vol. III, p. 84):

> "Q. It is true this boy never said a word to you when you got in the car? A. No, he did not.
>
> Q. He never put his hands on you? A. Not until after the car was parked.
>
> Q. He never struck you? A. No, sir.
>
> Q. He did nothing to cause you to form that opinion? A. Not until after the car was parked.
>
> Q. When the car was parked, tell us if he struck you? A. No, sir.
>
> Q. Tell us if he cursed you? A. I don't think he did.
>
> Q. *Did he say anything to be offensive to you?* A. *Not that I remember.*

Q. And he did ask if you would have sexual relations with him? A. Yes, sir.

Q. Don't you know you told him yes, go ahead? A. No I did not.

Q. Didn't you say, 'get it over with'? A. I said if you are going to, please hurry and take me where I can get some help.

Q. That is all you told him? A. Yes, sir.

Q. Did he do anything to you after that? A. No, sir.

Q. Did he mistreat you in any way? A. No, sir.

Q. Did he upbraid or curse you? A. No, sir."

There was testimony of other servicemen having spent time with the prosecutrix, including Koniczny, who on the very night of the alleged offense had previously parked with her for about 45 minutes. These witnesses had sexual relations with prosecutrix and would have testified to numerous acts of sexual intercourse with her (Vol. III, p. 352) had not such testimony been excluded by the trial judge as follows (Vol. III, p. 101):

"Q. How many occasions have you been to Kure's Beach with this woman? A. Three times, sir.

Q. Did you ever have sexual intercourse with her?

State objects.

Sustained.

Defendants except.

Court: Have you got any authority to show me? If you have I want to see it. The question in this case is: did these defendants have sexual intercourse with a woman forcibly and against her will. Give each of the defendants an exception."

It will be noted that prosecutrix herself testified previously on direct examination (Vol. III, p. 68):

"Q. Have you ever been out with any other boy since your husband went overseas besides Vingate? A. No sir."

and on cross examination (Vol. III, p. 80):

> "Q. You say you have not dated anyone? A. Yes sir, one boy.
>
> Q. The boy from Mississippi? A. Yes sir."

and after hearing the testimony of witnesses the prosecutrix, being recalled, testified (Vol. III, p. 170):

> "Q. Did you hear the testimony of the two marines in reference to you going to Kure Beach with them? A. Yes sir.
>
> Q. When was the first time you ever saw those two marines? A. The night they went to the hospital, when I was out there.
>
> • • •
>
> Q. You do not know their names? A. No sir.
>
> Q. Have you ever been out with those two men in your lifetime? A. No I have not."

The trial judge repeatedly permitted introduction of lengthy testimony, over defendant's objections, of numerous law-enforcement officers and public officials, 7 in number, that they had never seen prosecutrix in establishments where beer was sold. Testimony of such police officers and public officials customarily commands great credence and weight by jurors.

Illustrative of the foregoing is testimony of J. C. Mathews, a beer inspector for the Malt Beverage A.B.C. Board, New Hanover County (Vol. III, p. 161):

> "Q. Do you know all the various taverns and places that sell beer? A. Yes sir.
>
> Q. Over what period of time? A. Since 1951.
>
> Q. Are you familiar with the women that hang around those places?
>
> Mr. Goldberg: Objection.
>
> Overruled.
>
> Exception.
>
> A. Yes, sir.
>
> Q. Have you ever seen this young lady around those places? A. No sir.

Mr. Goldberg: We renew our objection and move to strike. At the most it is speculative and negative. There are many times when he would not be there and I do not see why it is competent.

Motion denied.

Defendants' except."

The record also contains the following illustration during the examination of David L. Turner, a member of the Wilmington Police Force concerning prosecutrix (Vol. III, p. 162):

"Q. Are you familiar with the establishments that sell beer? A. Yes sir.

Q. Have you ever seen this young lady behind me in any of those establishments?

Mr. Goldberg: Objection.

Overruled.

Exception.

A. No sir, I have not."

A further illustration is to be found during the examination of W. N. Jordan, a member of the Police Department (Vol. III, p. 164):

"Q. Are you familiar with where the various taverns are? A. Yes sir.

Q. During your work do you see the people that enter those places? A. Yes sir.

Q. Have you ever seen this young lady hanging around those taverns?

Mr. Goldberg: Objection.

Overruled.

Exception.

A. I don't remember I have ever seen her before."

A further illustration is to be found during the examination of Sergeant Robert E. Lawhorn of the Military Police (Vol. III, p. 165):

"Q. What are your duties in the down-town area of Wilmington? A. To patrol each and every one of the beer taverns.

Q. How long have you been making those patrols?

A. For approximately seven and a half months.

Q. During that time has that caused you to walk along the sidewalks in the down-town area?

Mr. Goldberg: Objection; you can't prove character that way.

Mr. Burney: The reason I am offering this evidence is they brought marines here yesterday that testified every time they saw the prosecuting witness she was walking the streets, and inferring she is a street walker.

The Court: He can testify if he ever saw that lady and if so where.

A. The first time I saw that lady was the morning of the 2nd of February when we searched for her."

A further illustration is to be found in the testimony of Levi D. Jones, serving in the Medical Department of the Armed Forces in Wilmington (Vol. III, p. 166):

"Q. Has your duties sent you in the down-town area of the city of Wilmington? A. Yes sir.

Q. Have you ever seen the prosecuting witness before? A. Not until the morning she was brought to the police station at six o'clock on the 2nd of February."

A further illustration is to be found in the testimony of C. E. Mason, a member of the Wilmington Police Department, (Vol. III, p. 169):

"Q. Have you ever seen this young lady before?

Mr. Goldberg: Objection.

Overruled.

Exception.

A. No sir."

A further illustration is to be found in the testimony of L. R. Bell, a member of the Police Department of the City of Wilmington (Vol. III, p. 170):

"Q. During the past six months have you worked the down-town area? A. Yes, sir, for about two and a half years.

Q. Have you ever seen the prosecuting witness before now?

Mr. Goldberg: Objection.
Overruled.
Exception.
A. No, sir."

Notwithstanding defense counsel's oft repeated objections and exceptions to the introduction of all this improper and highly prejudicial negative testimony, and also the denial of his duly made motion to strike out such testimony, the grave harm to petitioner's defense inherent in such testimony prompted counsel nevertheless unsuccessfully to again move to strike out such testimony (Vol. III, p. 172):

"Mr. Goldberg: I move that the testimony with reference to never having seen the prosecutrix by the various witnesses be stricken.
Mr. Sinclair: We also make that motion.
Overruled.
Each defendant excepts."

Subsequently, the Trial Judge during the direct examination of another witness upon an entirely different phase of the case, recognizing the error inherent in the admission of the foregoing testimony of the witnesses Mathews, Turner, Jordan, Bell, Jones, Lawhorn and Mason, stated (Vol. III, p. 177):

"Court: Gentlemen of the Jury: There has been some testimony here by a number of witnesses whose names the Court does not now recall, some of whom are officers of the City and other officers of other agencies, who gave evidence tending to show that during their inspection of certain places in Wilmington in which beer was sold they had not at any time seen the prosecutrix in either one or more of those places, and the evidence of some police officers that during the performance of their duties on their beats in the down-town section of the city discussed in this case, that at no time had they seen the prosecuting witness.

The Court regards that as being negative testimony, and I instruct you now you will not consider that either way; either for or against the defendants."

Only after the jury had heard all seven witnesses and during another phase of the trial, did the Trial Judge attempt to remedy the introduction of this improper testimony by instructing the Jurors that they would not consider the testimony either way, "for or against" the defendants. By no stretch of the imagination could such testimony be considered "for" the defendants and the parade of witnesses and action of the Court was most prejudicial to defendants.

On March 8, 1958, the Jury returned a verdict of Guilty of Rape with recommendation of life imprisonment and the Trial Court immediately sentenced both petitioners to confinement for life in State's Prison.

After sentencing petitioners as aforesaid the Judge descended from the Bench and that was the last time petitioners saw or appeared before said judge.

Upon pronouncement of sentence, due exception was taken in petitioners' behalf and Notice of Appeal to the Supreme Court of the State of North Carolina was immediately filed. At the same time, in the courtroom on March 8, 1958, petitioners were presented with various legal documents for signature which at a later date petitioners found to be, amongst other papers [Vol. III, pp. 247 (9-17)].

1. Application to appeal in *forma pauperis*, the petitioners were advised by then counsel that they had reasonable cause for the appeal, and they desired *in good faith* to appeal and that a copy of the transcript of evidence be furnished, without charge, to each (Vol. III, pp. 233, 236).

2. Certificates of attorneys Goldberg and Sinclair, then attorneys for petitioners, that petitioners have reasonable cause to prosecute the appeal from the conviction to the Supreme Court of the State of North Carolina (Vol. III, pp. 234, 237).

3. Order of the Superior Court after due examination of #1 and #2 above stating the opinion that petitioners' affidavits are in due form and made in good faith and upon advice of counsel, and ordering that petitioners be allowed to appeal to the Supreme Court of the State of North Carolina without bond and to prosecute in *forma pauperis* and ordering a transcript of proceedings and the evidence be furnished petitioners and that copies of the record and briefs required be also supplied at the expense of the County and assigning Attorneys Goldberg and Sinclair to prosecute the appeal to the Supreme Court of North Carolina in behalf of the petitioners; the Court allow petitioners *120 days from March 8, 1958* to serve statement of Case on Appeal (Vol. III, pp. 234, 237).

After the issuance of the aforesaid court order and almost simultaneously therewith, the following was signed by Petitioner Grundler and his father (Vol. III, p. 236), without any understanding thereof, and inconsistent with the appeal proceedings and the time allowed of *120 days to perfect appeal*:

"Mr. Aaron Goldberg:

On behalf of myself and my son I desire that the appeal taken in this case be withdrawn and abandoned.
March 8, 1958

WILLIAM HENRY GRUNDLER
ROBERT JOSEPH GRUNDLER"

Similarly, petitioner Jelly and his brother signed following (Vol. III, p. 239):

"Mr. David Sinclair:

In behalf of myself and my brother, I desire that the appeal taken in this case be withdrawn and abandoned.
March 8, 1958

RAYMOND F. JELLY
JOSEPH L. JELLY"

An order of the Superior Court directing abandonment of appeal *in open court* (notwithstanding the absence of the Presiding Judge), and instructing clerk to st ike Notice of Appeal from the Minutes of the Court, was entered (Vol. III, p. 239).

Petitioners were then, on March 8, 1958, confined to State's Prison for life.

Application in Petitioner Grundler's behalf was duly made to the Superior Court of New Hanover County in April 1958 for an order setting aside his alleged withdrawal and abandonment of his appeal (Vol. I, p. 1). The said application was timely made, immediately upon the discovery by present counsel that Petitioner Grundler had signed away his appeal rights as aforesaid. A delay was encountered by reason of the fact that the Court Reporter required time to prepare the transcript of trial. The application came on before Judge J. Paul Frizzelle of the New Hanover County Superior Court, State of North Carolina, on June 9, 1958 and the following papers were submitted in behalf of Petitioner Grundler's application [Vol. III, pp. 240 (1-30)].

1. Notice to set aside Withdrawal and Abandonment of Appeal, dated April 10, 1958.

2. Petition of Grundler herein, verified April 5, 1958.

3. Affidavits of his father, William Henry Grundler, 5th day of April, 1958 and the 14th day of May, 1958.

4. 19 pages of the excerpts of the Clerk's Minutes of the Superior Court of New Hanover County of the February-March 1958 Criminal Term.

5. Affidavits of his counsel, Herbert E. Rosenberg, sworn to the 14th day of May, 1958 and the 9th day of June, 1958.

6. Affidavit of Dr. Richard Horace Hoffman, 15th day of May, 1958 setting forth the mental status of Petitioner

Grundler and his father at the time of the signing of the waiver of appeal herein.

7. Joint affidavit of counsel George Rountree, Jr. and Herbert E. Rosenberg, 9th day of June, 1958.

The Solicitor of the Eighth Solicitorial District (embracing New Hanover County) submitted an answer dated June, 1958 [Vol. III, p. 240 (30)].

The Judge at the hearing before him on June 9, 1958 with Petitioner Grundler before the Court, having been brought down from State's Prison, stated in denying the application that it did not have jurisdiction and, in substance, that petitioner had remedy by certiorari before the North Carolina Supreme Court (App. A, pp. 31a-34a).

Immediately thereafter and in accordance with the decision of the lower court, application for Writ of Certiorari was made before Supreme Court, State of North Carolina (Vol. III) and simultaneously therewith appeal was taken to said court (Vol. I), it being Petitioner Grundler's contention that *as a matter of right* he should have been allowed to prosecute his appeal to the Supreme Court of North Carolina instead of applying to the discretion of said court by Writ of Certiorari. The application for Writ of Certiorari was held by said court and continued pending hearing of the appeal. The Supreme Court of North Carolina reversed the lower court holding in substance that the judge of the Superior Court to whom the application of Petitioner Grundler was addressed, had the power and duty to hear the matter and the case was then remanded for such *further hearing* (App. A, pp. 20a-24a).

A further hearing was had on the original application on March 5-6, 1959 (Vol. III, pp. 248-326) and the Superior Court denied the motion on the merits and appeal (Vol. II) was again taken to the Supreme Court of North Carolina. At the time of taking said appeal, Petitioner Grun-

dler likewise submitted a further supplemental affidavit in support of his pending application for Writ of Certiorari before the Supreme Court of North Carolina (Vol. III, pp. 26-44), thus bringing the proceedings up to date, advising of the status of the case, the reversal by the Court and the further hearing. The Supreme Court of North Carolina held the application for Writ of Certiorari together with the supplemental papers in support thereof, all in abeyance pending appeal. Stipulation was entered allowing Petitioner Jelly to adopt Petitioner Grundler's application and that any decisions made upon appeal apply to him (Vol. III, p. 247(9)).

The lower court in settling the case on appeal denied petitioners the right to present the entire record below and petitioners moved the Supreme Court of North Carolina (September 1, 1959) by separate motion, for a Writ of Certiorari suggesting there had been a diminution of the record so that the appeal could be heard on the entire record. The Supreme Court of North Carolina on September 2, 1959 held said motion continued after hearing of the appeal. On November 11, 1959 the Supreme Court of North Carolina rendered a decision appended hereto (App. A, pp. 1a-20a) affirming the appeal, granting the petition for certiorari (App. A, p. 13a) and after considering the assignments of error held no error in the trial.

Reasons for Granting the Writ

The gravamen of the prosecution for rape inhered in the charge of petitioners' use of force and violence to attain sexual intercourse with the prosecutrix as opposed to consent on her part. Indubitably, the sole and principal issue consisted of whether petitioners' intercouse with the prosecutrix was had without her consent.

The judgment of conviction of the youthful petitioners for the alleged capital and heinous offense is predicated

upon such an improper and unfair trial of the issue of consent as to deprive it of validity under the Fourteenth Amendment and require intervention by this Honorable Court by certiorari under 28 U. S. C. 1257(3).

In cases in which there is such claim of denial of rights under the Federal Constitution, this Court is not bound by the conclusions of the lower court, but will re-examine the evidentiary basis on which those conclusions are founded. *Niemotko* v. *Maryland* (340 U. S. 268, 271, 95 L. Ed. 268, 271); *Napue* v. *Illinois* (358 U. S. 919, 79 S. Ct. 293); *Davis* v. *Weschler* (263 U. S. 22, 24, 68 L. Ed. 144, 146).

The factor of consent is implicit throughout this case. The intercourse of petitioner Grundler with the prosecutrix immediately followed her expression to him of words of consent. He asked her permission and concededly no force, violence, intimidation, coercion or unlawful wiles were exercised by him upon the prosecutrix.

The only basis for supporting conviction of petitioner Grundler rests in the alleged use of force and violence by petitioner Jelly. The use of such force and violence by petitioner Jelly is alleged to have occurred prior to the entry of prosecutrix into petitioner Grundler's automobile, there being nought in the record to indicate that petitioner Grundler had any knowledge thereof. There was no charge of conspiracy. Clearly, under the circumstances, such alleged acts of force and violence on the part of petitioner Jelly, without the knowledge and privity of petitioner Grundler, may not be attributable to him and considered in connection with establishing his guilt of the offense charged. Aside from such alleged acts of force and violence on the part of petitioner Jelly, the record is entirely barren of any acts or conduct on the part of petitioner Grundler bearing upon the use of force and violence or lack of consent on the part of the prosecutrix, and accordingly petitioner Grundler's intercourse with the prosecutrix

cannot be denominated criminal except by juxtaposition with the alleged use of force and violence by petitioner Jelly.

The trial judge's repeated instructions to the jurors that they were at liberty to hold either defendant responsible or even guilty for the acts or conduct of the other defendant, notwithstanding the absence of any charge of conspiracy in the indictments, and notwithstanding the trial judge's ruling during the early part of the trial that testimony being received against petitioner Jelly would not be received against petitioner Grundler, exposed petitioner Grundler to conviction at the jurors' hands for alleged acts and conduct on the part of petitioner Jelly for which he was not legally accountable and compels the conclusion that petitioner Grundler could not and did not receive a fair trial and in the circumstances was deprived of his constitutional right to due process.

The trial judge's ruling excluding the testimony of witnesses who had sexual relations with the prosecutrix and who would have testified to numerous specific acts of sexual intercourse with her on the very evening of the alleged offense, so close in point of time and circumstances as to almost amount to *res gestae*, precluded petitioners from offering competent and most persuasive evidence on the issue of consent and also on the vital issue of prosecutrix' credibility upon which the State's case rested.

The Supreme Court of North Carolina in its opinion of November 11, 1959 (App. A, *infra*, p. 17a), stated in quoting from the decision of *State* v. *Wood*., 59 Arizona 48, 122 P. 2nd 416:

> "In perhaps the greater number of cases it is held that while the general reputation for chastity of a complaining witness may be shown, both as attacking the truth of her testimony and the question of whether she has consented to the intercourse, specific acts of unchastity are held to be inadmissible.

> The reason generally given in the cases where the one class of evidence is admitted and the other is refused, is that the witness will be prepared to meet attacks on her general reputation, while she may be taken by surprise and not able to defend herself against specific charges."

In this very same case, the Arizona High Court, in reversing a rape conviction and granting a new trial held it was error to exclude evidence which tends to show prior unchaste acts of prosecutrix with other men, the said Court stating:

> "If consent be a defense to the charge, then certainly any evidence which reasonably tends to show consent is relative and material and common experience teaches us that the woman who has once departed from the path of virtue is far more apt to consent to another lapse than is the one who has never stepped aside from that path.
>
> It is true that it is possible sometimes a prosecuting witness may find it difficult to disprove specific charges of previous unchastity because she is taken by surprise at the trial, but upon weighing the danger of that situation arising as against the possibility of the conviction of an innocent defendant, we think that on the whole justice is more apt to be done by the admission than the rejection of the evidence and such acts may be brought out either upon cross-examination of the prosecutrix or by other testimony. That error of this kind must be deemed prejudicial is obvious, for it might well have determined the jury as to whether it should believe the story of the defendant or that of the prosecutrix on the question of consent." (*State* v. *Wood*, *supra*)

While, on the one hand, the court excluded such evidence *of specific acts* of unchastity on the part of the prosecutrix upon insistence that only evidence of general reputation is admissible, on the other hand, specific instances of a negative character, consisting of testimony of a host of police

officers and public officials, calculated and intended to support a good character and reputation of the prosecutrix inconsistent with consent, was paraded before the jurors. There is nothing in the record to indicate that these public officials either knew or were entitled to testify to the reputation of prosecutrix for chastity. Their extensive and repetitious testimony was clearly inadmissible and highly prejudicial. The aggregate of their prestige obviously impressed the lay jurors with an ineffable stamp of approval of the good character and reputation of prosecutrix which was not removed by the belated statement to the jurors at a later stage of the trial and during an entirely different phase of the case that they should not consider such testimony either way, either for or against the defendants. The prejudicial effect of this testimony upon the minds of the jurors was so deep-seated and calculated to influence the consideration of the jurors that it was not erased or substantially minimized by the trial judge's remarks and constituted such fundamental unfairness as to amount to a denial of due process.

Petitioners' trial was further prejudiced by the introduction of extensive police testimony concerning alleged police investigations and activities subsequent to the time of the commission of the alleged offense. This testimony was in no way connected with establishing petitioners' guilt upon the trial of the indictments before the Court. It also included clearly inadmissible declarations of witnesses, prejudicial to petitioners, not made in the presence of petitioners. The aurora of police activities was designed to improperly and unfairly implant in the minds of the jurors the untrue and misleading impression that petitioners by devious means were concealing their guilt and that these police activities were necessary in order to track them down and destroy false explanations of innocence. Counsel freely concedes that competent, relevant and material evidence of crime resulting from police activities and investigations

is properly admissible. However, it is also true that the police activities and investigations undertaken subsequent to the time of the alleged offense have no more proper place in evidence than those of defense counsel. The injection of such testimony without serving any proper purpose was intended to and did prejudice the rights of petitioners to a fair trial.

Notwithstanding the capital nature of the offenses charged, the Trial Court's instructions on the law of the case substantially and lamentably misstated the principles of law properly applicable (Vol. III, pp. 198-223).

A reading of the charge in its entirety indicates clearly prejudice to petitioners by reason of both a misstatement of their claims and a substantial overstatement of the State's contentions as compared with those of petitioners' (Vol. III, pp. 198-223).

The Trial Judge mistakenly and to the prejudice of petitioners told the jurors and repeated that two of prosecutrix' teeth had been knocked out (Vol. III, pp. 203, 207) when the prosecutrix in her own testimony disclaimed any such injury (Vol. III, p. 79). The Judge also misstated the testimony of Petitioner Grundler that prosecutrix had orally consented to his having relations with her (Vol. III, pp. 147, 149, 150) by mistakenly telling the jurors that it was petitioner's claim that the prosecutrix had told him to hurry *in order to take her to a hospital* (Vol. III, p. 210), robbing petitioner of any basis for claiming a voluntary consent on the part of the prosecutrix. The record indicates clearly that the Trial Judge was in error.

The Trial Court further injected into the case the hideous shadow of "kidnaping" (Vol. III, p. 205) notwithstanding the petitioners were not being charged with or tried

for any such offense and the Trial Court's remarks[2] calculated to excite the jury, destroyed the presumption of innocence that petitioners were entitled to and so infused the trial with unfairness as to deny due process of law.

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[2] The following may serve to illustrate the general atmosphere. In the charge to the jury the Court stated (Vol. III, pp. 203-208):

"* * * knocked out two of her teeth" * * *

"* * * and the State contends he knocked her practically unconscious" * * *

"* * * The State contends Grundler was on the front seat waiting to carry out scheme to help or assist" * * *

"* * * and the State contends she became completely cowed by the effect of the blow given her by Jelly" * * *

"* * * and the State contends that was a cruel, heartless attack of a strong man on a weak and defenseless woman" * * *

"* * * that this assault was being made, as the State contends, on this defenseless, helpless woman" * * *

"* * * and the State contends that this evidence should satisfy your mind that these young men were determined to have sexual intercourse with this young woman forcibly and against her will; that is, whether she wished it or not" * * *

"* * * placed her on the side of the road helpless and alone; the State contending they did not care whether she lived or died." * * *

"* * * that these two men, both able bodied men, left, as the State contends, this defenseless girl after being assaulted by Jelly and Grundler, by both of them; left her on the side of the road to get back to town if she could, and drove away not caring whether she got back home or whether she died".

"And the State contends further that the facts of the case are such as would drive a fair minded man's mind irresistably to the conclusion that these young men, determined to have sexual intercourse with this girl or lady and with force of arms and by force of their superior will, by striking her and abducting or *kidnaping* her, as the State contends, and carrying her away, they placed her in such fear that she was powerless to resist and that both of them committed the crime"

"* * * that he struck her in the face and broke her jaw in three places and knocked out her teeth." * * *

"* * * that some men love darkness rather than light, because their deeds are evil."

The Trial Judge repeatedly instructed the jurors that they were at liberty to hold either defendant responsible or even guilty for the acts or conduct of the other defendant (Vol. III, pp. 221, 222) notwithstanding the absence of any charge of conspiracy in the indictments and notwithstanding further the Trial Judge's statement during the early part of the trial that testimony being received against Petitioner Jelly would not be considered against Petitioner Grundler (Vol. III, pp. 70, 71).

The vital element of lack of consent on the part of the prosecutrix was neither adequately nor correctly charged and it is clear that the jurors who returned for further instruction on that issue were not placed in a position by the Court's instructions to intelligently or legally determine the same (Vol. III, pp. 222-223).

Upon review on certiorari, the learned Supreme Court of the State of North Carolina failed to give adequate consideration to the Trial Court's particular errors and the total resultant prejudice to petitioners, which by depriving them of their right to a fair trial, violated the due process clause of the Fourteenth Amendment.

When all the foregoing combined factors in a capital case are taken into consideration, it is respectfully submitted that the necessity for corrective action is apparent, as petitioners' trial was fundamentally unfair and therefore constituted a denial of due process of law.

The proceedings in the Superior Court were permeated with an atmosphere of undue haste and disregard for the protection of the rights and privileges of petitioners charged with a most heinous, disgraceful capital offense, with the notable and totally incomprehensible providing of an appeal, assignment of errors and assignment of counsel, the granting of *120 days* to appeal, with allowance to petitioners to proceed in *forma pauperis*, and, almost in

the same breath, a direction in the record for abandonment of such appeal (Vol. III, pp. 232-239).

The occurrences with respect to the appeal of petitioners have been thoroughly set forth in Volumes I, II and III submitted herewith. It is respectfully submitted that the states are not required by the federal Constitution to provide appellate courts or a right to review at all, but that is not to say that a State that does grant appellate review can do so in a way as to give the word of promise to the ear of those illegally convicted and break it to their hope and consequently at all stages of the proceedings the due process and equal protection clauses protect persons like petitioners. *Cole* v. *Arkansas*, 333 U. S. 196, 92 L. Ed. 644, 68 S. Ct. 514; *Griffin* v. *Illinois*, 351 U. S. 12, 18, 100 L. Ed. 898.

CONCLUSION

For the reasons set out above, it is respectfully submitted that this Court should grant this petition for a Writ of Certiorari to review the judgment of the Supreme Court of North Carolina.

Respectfully submitted,

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233 Broadway,
New York 7, N. Y.,
Counsel for Petitioners.

EDWARD NORWALK,
of Counsel.

Appendix A

SUPREME COURT OF NORTH CAROLINA

Fall Term, 1959

No. 145—New Hanover

STATE

v.

ROBERT J. GRUNDLER

and

STATE

v.

JOSEPH LEONID JELLY,

Appeal by defendants from Parker, J., March 1959 Criminal Term of New Hanover.

Defendants were indicted by the Grand Jury at the February, 1958, Term of Superior Court of New Hanover County in separate bills of indictment. The bills charged each of them with the capital offense of rape. The cases were consolidated for trial and were tried at the March, 1958, Criminal Term of said county before Burgwyn, E. J., and a jury. As to each of them "the jury returned a verdict of guilty of rape with recommendation of life imprisonment." Thereupon the court entered judgment of imprisonment for life as to each. G. S. 14-21. Defendants gave notice of appeal in open court. On the same day and in open court at term, the judge at request of defendants entered an order permitting defendants to abandon and withdraw their appeals and the appeals were thereby dis-

missed. Thereafter defendants filed petition in Superior Court to set aside the order dismissing the appeals and applied to Supreme Court of North Carolina for *certiorari*.

From "Order and Judgment" denying defendants' petition to set aside order of Burgwyn, E. J., dismissing the appeals, defendants excepted and appealed, assigning errors.

ATTORNEY GENERAL SEAWELL and ASSISTANT ATTORNEYS GENERAL BRUTON and MOODY for the State.

ARTHUR P. HARTEL, JR., HERBERT E. ROSENBERG and EDWARD NORWALK for defendants-appellants.

MOORE, *J.* Defendants were represented at the criminal trial by counsel of their own choice, employed and paid by them. Upon the coming in of the verdict the jury was polled. The defendants, and each of them, in apt time moved to set aside the verdict, for new trial and in arrest of judgment. Upon the overruling of the motions, defendants gave notice of appeal and made written application in due form to be permitted to appeal in forma pauperis. The court forthwith entered an order providing: (1) defendants are permitted to appeal to Supreme Court without giving bond for costs and in forma pauperis; (2) transcript of the trial proceedings and evidence be furnished to defendants and their counsel at public expense; (3) the cases on appeal and appeal briefs, together with the required copies thereof, be typed and furnished at public expense; (4) counsel who had represented defendants at the trial are appointed to prepare and argue the appeals at public expense. One hundred and twenty days were allowed for preparing and serving case on appeal.

About an hour later defendant Grundler and his father signed and delivered to his attorney, the following writing:

Appendix A

"Mr. Aaron Goldberg:

On behalf of myself and my son I desire that the appeal taken in this case be withdrawn and abandoned.

This 8th day of March, 1958.

WILLIAM HENRY GRUNDLER
ROBERT JOSEPH GRUNDLER."

Immediately thereafter defendant Jelly and his brother signed and delivered to his attorney a written statement as follows:

"Mr. David Sinclair:

On behalf of myself and my brother, I desire that the appeal taken in this case be withdrawn and abandoned.

March 8, 1958.

RAYMOND F. JELLY
JOSEPH L. JELLY."

Upon being informed of defendants' desires to withdraw the appeals, the court required that the defendants be brought before the court. The defendants were asked to stand and state in person whether or not they desired the appeals withdrawn and abandoned. Pursuant to defendants' statements that they desired the appeals withdrawn, the court entered an order dismissing the appeals.

Twenty-eight days later, 5 April, 1958, Grundler filed a petition in the Superior Court of New Hanover County to set aside the order dismissing the appeal. In the meanwhile he had employed different attorneys, one of them from his home state of New York.

The petition alleged in substance: Petitioner protests his innocence. "* * * (T)he jury's verdict and subsequent

sentence of life imprisonment by the court left me in a state of shock and great emotional upset * * *. The only recollection deponent has concerning the signing (request to attorney to withdraw appeal) is that it was suggested that I sign rather than if I lost the appeal and receiving the Gas Chamber. In my then condition, even though innocent of the alleged crime, the fear of the Gas Chamber and my state of shock caused me to sign anything that was placed before me.' Petitioner should be given opportunity to review trial record and confer with his attorney from his home state. An appeal would prejudice no one. The trial attorney and present attorneys advise there is reasonable cause to prosecute the appeal. Petitioner has a meritorious appeal.

The District Solicitor filed answer opposing the petition. The matter came on for hearing at the June, 1958, Term before Frizzelle, J., who dismissed the petition on the ground that the Superior Court "* * * has no jurisdiction or authority under G. S. 1-220 to hear the motion * * *." Petitioner appealed. This Court ruled that the judge was in error in dismissing the petition and remanded it for further hearing. State v. Grundler, 249 N. C. 399, 106 S. E. 2d 488.

Further hearing upon the petition was had before Parker, J., at the March, 1959, Criminal Term of New Hanover County Superior Court. At this hearing it was stipulated that the defendant Jelly "may adopt the original petition filed by * * * Grundler in the original cause and that the State may use the same answer as to Jelly as in the Grundler case * * *." It was further stipulated "that the only issue is whether or not the order revoking the order granting a right to appeal in forma pauperis, signed by the Hon. Burgwyn, J., should be set aside for mistake, inadvertence, surprise or excusable neglect."

Evidence in support of the petition tends to show: Grundler and Jelly are 22 and 23 years of age, respectively.

They are members of the U. S. Marine Corps. Grundler is from New York and Jelly from Massachusetts. They had believed they would be acquitted and were shocked at the verdict and sentence. They were emotionally upset and cried. They were never in court before. They desired to appeal and knew they had been granted 120 days to prepare appeal. They made no request for appeal in forma pauperis; their families were and are willing to bear the expense. They were so emotionally disturbed that they did not know until April they had signed away their right to appeal. They knew that upon a new trial they would be tried for the capital offense and had possibility of a death sentence. They are informed they have meritorious grounds for appeal. They waive the relationship of attorney and client and agree that Messrs. Goldberg and Sinclair be called to testify. Grundler's father and Jelly's brother were with them throughout the trial. They too were shocked and emotionally upset by the verdict and judgment, did not realize what transpired thereafter, did not know the appeal had been withdrawn until weeks later. They have financial means to defray expenses of appeal for their son and brother.

Other evidence adduced at the hearing tends to show: Defendants' attorneys did not promise or guarantee a favorable verdict. About an hour after appeal entries had been made defendants requested their attorneys to withdraw the appeals. Attorneys protested, asked them to take more time to consider and to confer with attorneys in their home states. When defendants insisted on withdrawing appeals, attorneys required that the requests be put in writing. The judge refused to dismiss the appeals on the written requests, had the defendants brought before him, and required them to stand and personally state whether or not they desired the appeals withdrawn. Defendants in person in open court requested the judge to withdraw the appeals. The order was then made. Mr.

Goldberg is a lawyer of 31 years experience at the New Hanover County Bar. Mr. Sinclair has been a practicing attorney for 35 years, four years of which he was District Solicitor; he has been defense counsel in 35 capital cases. An assistant clerk of the court saw defendants sign the application to appeal in forma pauperis and the requests to withdraw the appeals. In each instance they told him they understood what they were signing and it appeared to him that they did. Several weeks after the trial, Grundler's father and his present attorney from New York went to the office of the District Solicitor and discussed the possibility of a future parole for Grundler. After this the petition herein was filed.

After hearing the evidence, Judge Parker found the following pertinent facts:

> "2. That upon the trial of the cause the defendant Robert J. Grundler was represented by the Honorable Aaron Goldberg, of the New Hanover County Bar, and the defendant Joseph Leonid Jelly was represented by the Honorable David Sinclair, of the New Hanover County Bar; that both attorneys * * * are outstanding, efficient and accomplished Counselors at Law, possessing unquestionable integrity and ability, and at all times concentrated their legal efforts for the best interest of their client."
>
> "5. That each defendant was allowed to appeal to the Supreme Court of North Carolina in forma pauperis, which also appears of record.
>
> "6. That thereafter, and within a period of approximately one hour, William Henry Grundler, who had been present during the trial and participated in the conference with Attorney Goldberg and his son, the defendant, moved the Court to be permitted to withdraw his appeal, which withdrawal

was allowed by the Court, after questioning the defendant Grundler in open court, and after the defendant Robert J. Grundler, along with his father, William Henry Grundler, had signed a statement to his attorney, the Honorable Aaron Goldberg, specifically requesting that such motion for withdrawal of appeal be made before the Court by his Attorney Goldberg.

"7. That this motion for withdrawal of appeal was made under protest by Attorney Goldberg, and against his advice, and after the defendant Robert J. Grundler, in the presence of his father, William Henry Grundler, had been fully advised of his rights in the matter of said appeal, as will appear from the evidence in this hearing.

"8. That the defendant Joseph Leonid Jelly, along with his brother Raymond Jelly, who likewise had been present during the trial and participated in the conference with Attorney David Sinclair and his brother, the defendant, moved the Court to be permitted to withdraw his appeal, which withdrawal was allowed by the court after questioning the defendant Joseph Leonid Jelly in open Court, and further the defendant Joseph Leonid Jelly, along with his brother Raymond Jelly, had signed a statement to his attorney, the Honorable David Sinclair, specifically requesting that such motion for withdrawal of appeal be made before the Court by his Attorney, Sinclair.

"9. That this motion for withdrawal of appeal was made under protest by Attorney Sinclair, and against his advice, and after the defendant Joseph Leonid Jelly, in the presence of his brother Raymond Jelly, had been fully advised of his rights in the

matter of said appeal, as will appear from the evidence in this hearing."

The court further found that defendants were "fully informed by said counsel of all the facts and circumstances surrounding said orders, and (defendants) fully comprehending and understanding the same." The court concluded that the order dismissing the appeal was not entered because of mistake, inadvertence, surprise and excusable neglect of defendants. Defendants' petition was denied and defendants appealed.

A person convicted of any criminal offense in Superior Court "shall have the right to appeal". G. S. 15-180. An appellant has the right to dismiss his appeal with leave of court. U. S. v. Griffith (1890), 141 U. S. 212. An appeal is under the control of the court for all purposes and appellant does not have absolute right to dismiss it. In capital cases and in other serious felonies it must affirmatively appear that the prisoner advisedly assents to, desires and directs that his appeal be withdrawn and dismissed. State v. Leak, 90 N. C. 655. To make the withdrawal effective the court must so order and leave of court is required. 5 C. J. S., Appeal and Error, sections 1350 and 1351, pp. 397-401. Application to withdraw appeal is addressed to the sound discretion of the court. Luther v. Luther (Ala. 1924), 100 So. 497, 498; Dadabaugh v. Just (Minn. 1947), 30 N. W. 2d 534.

Application to withdraw appeal must be made to the proper tribunal, the court having jurisdiction to dismiss. L. R. A. (1917A) 117. It has been held in this jurisdiction that when appeal entries are noted, the appeal becomes effective *eo instanti*, and the Superior Court is *functus officio* to make order affecting the merits of the case. Bailey v. McPherson, 233 N. C. 231, 239, 63 S. E. 2d 559. But the court in its discretion may, upon application of appellant, dismiss the appeal during the term at which

the case was tried. Jurisdiction of all matters pertaining to the settlement of the case on appeal remains in the trial judge. And it has been held that the judge presiding at a later term, after notice and on proper showing, may adjudge that the appeal has been abandoned and proceed in the cause as if no appeal had been taken. Hoke v. Greyhound Corp., 227 N. C. 374, 376, 42 S. E. 2d 407.

"As a general rule, it is within the discretion of an appellate court, upon good cause shown, to reinstate an appeal * * * provided there has been no laches." 3 Am. Jur., Appeal and Error, sec. 759, pp. 327-328. We perceive no good reason why this rule does not apply with equal force to the trial court where it has jurisdiction to hear the matter. In the instant case we have declared that the trial court did have such jurisdiction. State v. Grundler, *supra*. However, in this case the State and the defendants stipulated that the Court should inquire only as to whether the order of dismissal should be set aside for mistake, inadvertence, surprise or excusable neglect. It is clear that the parties brought themselves within the framework of G. S. 1-220. The matter will be considered here upon the same theory as that adopted by the parties below. Waddell v. Carson, 245 N. C. 669, 673, 97 S. E. 2d 222; Paul v. Keece, 244 N. C. 565, 570, 94 S. E. 2d 596. We state parenthetically that the judge below had authority to reinstate the appeal upon any ground which might have seemed satisfactory and just to him in the exercise of his sound discretion.

The pertinent portion of G. S. 1-220 provides: "The judge shall, upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment, order, verdict or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect * * *."

Defendants' first four assignments of error relate to the failure of the court to find in fact and in law that the order dismissing the appeal was obtained through their mistake,

inadvertence, surprise or excusable neglect. They contend that such failure and the contrary finding by the court was error. They contend that because of the verdict and judgment they were in a state of shock and emotional instability to the extent that they could not and did not comprehend the advice of counsel and the acts done and things said by them at the time in question. The court found to the contrary. The findings of fact by the court are based on competent evidence. We have consistently held in a long line of cases that the findings of fact by the trial court upon the hearing of a motion to set aside a judgment for mistake, inadvertence, surprise or excusable neglect, G. S. 1-220, are conclusive on appeal when supported by any competent evidence. Sanders v. Chavis, 243 N. C. 380, 385, 90 S. E. 2d 749; Perkins v. Sykes, 233 N. C. 147, 151, 63 S. E. 2d 133; Hanford v. McSwain, 230 N. C. 229, 233, 53 S. E. 2d 84; Craver v. Spaugh, 226 N. C. 450, 452, 38 S. E. 2d 525; Carter v. Anderson, 208 N. C. 529, 531, 181 S. E. 750; Hilderman v. Mills Co., 192 N. C. 626, 628, 135 S. E. 627.

"The findings of fact by the judge are conclusive, except when there is no evidence to support them. (Citing authorities.) Whether the facts found constitute excusable neglect is a conclusion of law reviewable on appeal. But if there is excusable neglect, whether the judge shall then set aside the judgment or not rests 'in his discretion,' • • • from which an appeal lies only when there has been a clear abuse of such discretion. (Citing cases.) The discretionary power only exists when excusable neglect has been shown. (Citing cases.)" Morris v. Insurance Co., 131 N. C. 212, 42 S. E. 577. The discretion is held to be a legal discretion and therefore reviewable. But it will not be reviewed except in cases of gross abuse. Rierson v. York, 227 N. C. 575, 578, 42 S. E. 2d 902.

In the case at bar the findings of fact support the legal conclusion that "there was no mistake, inadvertence, surprise or excusable neglect in regard to • • • the withdrawal

of said notice of appeal and appeal by the defendants." We find no error of law in this legal conclusion.

The judge was not required to adopt defendants' version of the facts. The facts were in dispute. The court found the facts in accordance with the evidence favorable to the State's position. This the court had a right to do. Defendants in their brief and in the argument here failed to point out any error of law on the part of Judge Parker with respect to the hearing and the judgment entered by him. Appellants must show error. Johnson v. Heath, 240 N. C. 255, 258, 81 S. E. 2d 657.

The fifth assignment of error urges that Judge Parker abused his discretion in refusing to relieve defendant from the order dismissing the appeal. Actually upon the facts as found the judge was not called upon to exercise a discretion. Upon the whole record no abuse of discretion appears and defendants do not point out any respect in which discretion was abused.

In the sixth and last assignment of error defendants attempt to raise a constitutional question on this appeal. They assert that at the hearing and in the judgment they were denied due process and equal protection of the law in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

A careful scrutiny of the record discloses that no such question was raised in defendants' petition or at any time during the hearing below. This matter was injected for the first time on appeal. The assignment of error refers to no exception taken and to no ruling of the court. Furthermore, defendants entered into a stipulation at the hearing "that the only issue is whether or not the order * * * should be set aside for mistake, inadvertence, surprise or excusable neglect." Under certain circumstances a constitutional right may be waived. In re Steele, 220 N. C. 685, 689, 18 S. E. 2d 132; Jennings v. Illinois, 342 U. S. 104, 109. A defendant may waive a constitutional right relating to a

mere matter of practice and procedure. Miller v. State, 237 N. E. 29, 48, 74 S. E. 2d 513. "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U. S. 458, 464.

The purported question was injected for the first time on appeal. The attempt to smuggle in new questions is not approved. Irvine v. California, 347 U. S. 128, 129. Appellate courts will not ordinarily pass upon a constitutional question unless it affirmatively appears that such question was raised and passed upon in the trial court. State v. Jones, 242 N. C. 563, 564, 89 S. E. 2d 129. This is in accord with the decisions of the Supreme Court of the United States. Edelman v. California, 344 U. S. 357, 358.

In support of defendants' contention that they have been denied "due process" and "equal protection of the laws" reliance is made almost entirely on the case of Griffin v. Illinois, 351 U. S. 12. They quote extensively therefrom. It will be observed that the decision in the Griffin case is by a divided court and there is no majority opinion. This case simply decides that where a State provides for an appeal to an appellate court from a criminal conviction the poor must have the same adequate appellate review as is accorded the rich even if it requires that the expense of transcript, prosecution of the appeal and other costs be borne by the State. With this proposition our Court is in thorough accord and the law of this State so provides. G. S. 15-181. In the instant case the trial court granted the right to appeal in forma pauperis and ordered that transcript, case on appeal, briefs and counsel be provided at public expense. The Griffin case has no application to the facts in this case. Defendants attempt to draw the unwarranted conclusion that the Griffin case guarantees adequate appellate review at any time and under such terms as appellant chooses and without regard for the rules of the court and the requirements of procedure. If defendants' contention is carried to its logical conclusion, it would

be compulsory to grant an appeal to every defendant convicted of a serious felony whether he wanted to appeal or not. Compliance with rules of court is uniformly required by appellate courts. Brown v. Allen, 344 U. S. 443. Defendants advisedly withdrew their appeals. It would seem that they were motivated by fear " the possible consequences of a new trial. They have since changed their minds and seek to be relieved of their own solemn decision, suggesting some vague and sinister deprivation of constitutional rights.

Defendants' appeal might well have been dismissed without discussion. The assignments of error refer to no exceptions taken and we find no numbered exceptions in the record. Rule 19(3) of the Rules of Practice in the Supreme Court of North Carolina, 221 N. C. 553 *et seq.*

The judgment below is affirmed.

It is apparent that Judge Parker gave no consideration to the question as to whether or not defendants had a meritorious appeal. There are two very good reasons why he did not deal with this subject. In the first place it was removed from his consideration by the stipulation above referred to. Secondly, his findings of fact rendered it unnecessary that he consider the question. Ordinarily an order or judgment will not be set aside unless it appears that there is merit and that a different result probably will be reached by so doing. Craver v. Spaugh, *supra.*

Perhaps defendants were influenced in entering into the stipulation restricting the scope of Judge Parker's inquiry by the fact that they had petitioned this Court for *certiorari.* A petition for the writ must show merit or that error was probably committed below. In re Snelgrove, 208 N. C. 670, 672, 182 S. E. 335. *Certiorari* is a discretionary writ, to be issued only for good and sufficient cause shown. Womble v. Gin Company, 194 N. C. 577, 579, 140 S. E. 230.

We are constrained to allow the petition. We wish to emphasize that we are not induced so to do by reason of

any error on the part of Judge Parker, for there was none. Defendants have filed with their petitions for writ of *certiorari* the record proper, the proceedings, the transcript of the evidence (in narrative form as required by our rules—Rule 19(4)) and the charge of the court had upon the criminal trial. They have also filed briefs pointing out what they conceive to be prejudicial errors in the trial. For the purpose of considering the matters thus raised we grant the writ. We do not deem further argument here of value. In their arguments heretofore heard by this Court counsel have pointed out and discussed what they consider to be the merits of their proposed appeals.

The following is a brief statement of the facts:

State's evidence tends to show: Prosecutrix is the wife of a member of the U. S. Marine Corps serving overseas. She lives in Wilmington with her brother. On the night of 1 February, 1958, she went to a movie. Afterwards she rode about two blocks with a friend, Ronnie Wingate, a marine. She then went to a cafe on Market Street for coffee. The defendants came into the cafe and approached her. Jelly asked her to go out with them. Grundler said nothing. Prosecutrix told them to leave her alone. She left the cafe without finishing her coffee. A waitress in the cafe heard and observed the occurrence. There were no other marines in the cafe. Jelly followed her. It was snowing. Grundler paid for his and Jelly's orders, left the cafe, drove their car to a street corner where prosecutrix would pass. Jelly accosted prosecutrix, offered her money and was told she was not for sale. At the car Jelly stopped her and took her arm. She screamed. He hit her in the face and placed his hand over her mouth. She screamed again and he struck her a second time and forced her into the car. It was about 11:30 P. M. Grundler drove away. Two members of the U. S. Air Force, who were about 60 yards away, heard her scream and saw Jelly strike her and drag her into the car. They immediately reported the

incident to the police. A search for the car was begun. When prosecutrix was examined next morning by physicians her jaw was swollen, she had three loose teeth and her cheek bone was fractured in three places. Grundler drove them to a rural area. Jelly held her down and took off her underclothes. She begged him not to rape her. When she offered resistance, he told her if she wasn't quiet and didn't lie still he would strike her again. She was afraid he would kill her. He then had an act of sexual intercourse. Grundler then stopped the car and got in the back seat with her and asked her to yield to him. She told him not to have intercourse. When he insisted, she told him if he was going to have intercourse to hurry up and take her to a doctor. Grundler then performed the act. Jelly then asked her to perform an unnatural act of intercourse. She told him her jaw was broken. They put her out of the car in the country several miles from her home. She was picked up by a passing car and carried home. Her scarf and gloves were bloody and two buttons were missing from her dress. She related the occurrence to her brother but did not notify police. A highway patrolman stopped defendants' car nine miles north of Wilmington. There was blood on the door post and back seat. Defendants stated they had been to Myrtle Beach in South Carolina and the blood came from one of their buddies who had had trouble there. At request of the patrolman defendants returned to Wilmington. Blood stains were found on Jelly's hand and jacket. The buttons from prosecutrix's dress were found in the car. Grundler later told of the occurrence but denied that prosecutrix had been raped or assaulted to his knowledge.

Defendants' evidence tends to show: Members of the U. S. Marine Corps, Konieczny and Wenzell, had known prosecutrix for some time and had taken her out for rides on three occasions. On this night they had taken her out and remained parked with her in a rural area for about

forty-five minutes. She had told them she was widow of a marine who had been killed. After they returned her to Wilmington and put her out, they saw defendants and told them prosecutrix was at the cafe. Defendants proceeded to the cafe and talked to prosecutrix who was friendly. Jelly walked from the cafe and up the street with his arm about her waist. Merrigan and McCollum, marines, were in the cafe and witnessed the occurrence. At the car prosecutrix slipped and fell and Jelly helped her up and into the car. She did not scream. Jelly had intercourse with her first. She was cooperative. She took off her underclothes voluntarily. She consented for Grundler to have intercourse. Afterwards she wanted money. They put her out at her request. She said she lived near there. She never said she was hurt or frightened. She was bleeding.

In rebuttal prosecutrix testified that Merrigan and McCollum were not in the cafe at any time while she was there and that she did not know Konieczny and Wenzell and had never been out with them.

We consider defendants' assignments of error in order.

(1) Defendants contend the court was in error in consolidating the cases for trial. They insist there should have been a severance. The record does not disclose that defendants excepted to the consolidation or that they moved for a severance. The rule of law with respect to consolidation of indictments is stated in State v. Bryant, 250 N. C. 113, 115, 108 S. E. 2d 128, quoting from State v. Combs, 200 N. C. 671, 674, 158 S. E. 252, as follows: "The court is expressly authorized by statute in this state to order the consolidation for trial of two or more indictments in which the defendant or defendants are charged with crimes of the same class, which are so connected in time or place as that evidence at the trial of one of the indictments will be competent and admissible at the trial of the others. C. S. 4622 (now G. S. 15-152). (Citing cases.)" It is so

obvious that the indictments in this case fall within this rule that further discussion is deemed unnecessary. The material evidence is equally pertinent to both indictments.

(2) After testifying on direct examination that he had a date with prosecutrix on the night of 1 February, 1958, and had remained parked with her about forty-five minutes, the witness Konieczny was asked whether or not he had sexual intercourse with her on that occasion. The State objected and the court sustained the objection. Had he been permitted to answer he would have testified that he did. Defendants assert that this evidence was competent on the question as to whether or not the prosecutrix consented in the case *sub judice*.

As to whether specific acts of sexual intercourse with third parties are admissible in cases of rape as evidence tending to show likelihood of consent, courts are in disagreement. "* * * (W)hile some authority holds that specific acts of intercourse or lewdness committed by the prosecutrix with other persons may be shown, other authority requires prosecutrix' want of chastity to be shown by evidence of general reputation for unchastity and not by proof of specific acts." 75 C. J. S., Rape, sec. 63, pp. 535-536. This question is fully annotated in 140 A. L. R., 364 *et seq.* "Without exception, the cases holding that previous want of chastity may be shown by proof of reputation." (ibid, p. 380). It would seem that the greater weight of authority is that specific acts of unchastity are inadmissible (ibid, p. 383). "In perhaps the greater number of cases it is held that while the general reputation for chastity of a complaining witness may be shown, both as attacking the truth of her testimony and the question of whether she has consented to the intercourse, specific acts of unchastity are held to be inadmissible. The reason generally given in the cases where the one class of evidence is admitted and the other is refused, is that the witness will be prepared to

meet attacks on her general reputation, while she may be taken by surprise and not able to defend herself against specific charges." State v. Wood (Ariz. 1942), 122 P. 2d 416, 140 A. L. R. 361. "Basis of rule limiting evidence of unchastity of prosecutrix in prosecution for rape to proof of general character in that respect is the unwisdom of opening door to collateral issues tending rather to hinder than promote justice." Stone v. State (Ala. 1943), 11 So. 2d 386.

Our Court has held that for the purpose of impeachment the prosecutrix may be cross-examined concerning specific acts of unchastity. State v. Murray, 63 N. C. 31, 32. And that where the chastity of the prosecuting witness is directly in question, her reputation for chastity may be shown. State v. Connor, 142 N. C. 700, 705-6, 55 S. E. 787; State v. Daniel, 87 N. C. 507, 508-509. But we have held that specific acts of unchastity with persons, other than defendant, are inadmissible in rape cases. State v. Jefferson, 28 N. C. 305, 307. This case is listed in 140 A. L. R., 386, annotation referred to above, as supporting the minority view. We do not so construe it. In that case it is said: "No doubt, too, that it would have been proper to receive evidence, that the woman was a strumpet, upon similar grounds; and particularly, that she had illicit intercourse with other(s) * * * But that ought only to be done upon general evidence * * *." The court in the instant case did not commit error in excluding evidence of specific acts of unchastity with persons, other than defendants.

(3) The court over the objection of defendants permitted law enforcement officers, seven in number, to testify that they had never seen prosecutrix in establishments where beer was sold. This evidence was incompetent. The State may only prove her general character—it may not offer proof of particular traits of character. North Carolina Evidence: Stansbury, sec. 110, p. 206, and cases there

cited. However, his Honor promptly withdrew this evidence from the consideration of the jury and instructed them not to consider it either for or against the defendants. "The power of the court to withdraw incompetent evidence and to instruct the jury not to consider it has long been recognized in this State * * *. In McAllister v. McAllister, 34 N. C., 184, Ruffin, C. J., said: 'It is undoubtedly proper and in the power of the court to correct a slip by withdrawing evidence from the consideration of the jury * * * * *'" State v. Green, 251 N. C. 40, 46, — S. E. 2d —, and the many cases there cited. If the matter complained of by defendants is error, it is not prejudicial error.

(4) Defendants complain that the court permitted police officer Sykes to repeat on the witness stand statements made to him by members of the U. S. Air Force who had theretofore testified in the case. These statements had not originally been made in the presence of defendants. The statements were competent to corroborate the Air Force witnesses, and the court specifically restricted the evidence to that purpose. This exception is without merit.

(5) Defendants assert that the court erred in interrogating some of the witnesses, that the judge thereby expressed opinion as to the weight of the evidence. The record discloses no objection or exception thereto. Nevertheless, we have carefully considered these questions and answers. We find that they were only for clarification. State v. Stevens, 244 N. C. 40, 44, 92 S. E. 2d 409; State v. Carter, 233 N. C. 581, 583, 65 S. E. 2d 9.

(6) The final exceptions are to the court's instructions to the jury. The charge, when considered conjunctively and contextually, properly declared and explained the law arising on the evidence. G. S. 1-180. State v. Hodgin, 210 N. C. 371, 378-379, 186 S. E. 495. There were no requests for special instructions. State v. Coal Co., 210 N. C. 742, 755, 188 S. E. 412. If there were minor errors and dis-

crepancies in the giving of contentions of the parties, these must be called to the attention of the court at the time so that correction may be made. None were called to the attention of the court. State v. Bowser, 214 N. C. 249, 255, 199 S. E. 31. Equal stress was given to the contentions of the State and defendants. State v. Smith, 237 N. C. 1, 27, 74 S. E. 2d 291. We find no error in the court's charge to the jury.

In the trial of these cases we find no error.

On the appeal, affirmed.

In the trial, no error.

Higgins, J., not sitting.

IN THE

SUPREME COURT OF NORTH CAROLINA

Fall Term, 1958

No. 151—New Hanover

STATE

v.

ROBERT J. GRUNDLER

Appeal by defendant from Frizzelle, J., at June 1958 Criminal Term of New Hanover.

Criminal prosecution upon a bill of indictment, found at February 24, 1958 Term a true bill, charging that Robert J. Grundler, on the first day of February, 1958, with force and arms, at and in New Hanover County, did, unlawfully, willfully and feloniously, ravish and carnally know a certain named female person, by force and against her will,

against the form of the statute in such case made and provided and against the peace and dignity of the State, heard in Superior Court of New Hanover County upon motion of defendant to set aside defendant's withdrawal and abandonment of appeal entered 8 March, 1958.

Pertinent thereto the record on this appeal shows substantially the following:

1. Upon arraignment in Superior Court on the charge lodged against him defendant pleaded not guilty.

2. At March 1958 Criminal Term of New Hanover the jury returned verdict: Defendant is guilty of rape with recommendation of life imprisonment.

3. Judgment was entered March 8, 1958 of said court that defendant be confined in the State prison for the term of his natural life.

4. Defendant made formal motions of procedural nature, to the denial of which he excepted, and appeals to the Supreme Court in forma pauperis.

5. And as prerequisite to such appeal (a) defendant executed affidavit, (b) presented certificate of attorney Aaron Goldberg, counsel for defendant, and (c) procured order of the presiding judge, W. H. S. Burgwyn, E. J., dated March 8, 1958, granting to defendant permission to so appeal, and requiring the Board of Commissioners of New Hanover County to obtain and furnish to defendant transcript of proceedings, all apparently in full compliance with law—and appointing attorney Aaron Goldberg to prosecute said appeal to Supreme Court of North Carolina, for and on behalf of said defendant, and defendant was allowed 120 days in which to serve case on appeal upon the Solicitor.

And the record shows that on the same date the following was addressed to

Appendix A

"Mr. Aaron Goldberg—

On behalf of myself and my son I desire that the appeal taken in this case be wtihdrawn and abandoned.

WILLIAM HENRY GRUNDLER
ROBERT JOSEPH GRUNDLER"

pursuant to which the Judge presiding, W. H. S. Burgwyn, E. J., signed an order that the appeal be abandoned, and "the Clerk is instructed to strike said notices of appeal from the minutes of this court."

The record also shows that thereafter on 10 April, 1958, and within the time allowed defendant to serve case on appeal as above stated, Herbert E. Rosenberg and George Rountree, Jr., as counsel for defendant gave notice to Solicitor Burney, of the Fifth Judicial District, that, in the Superior Court of New Hanover County at the courthouse in Wilmington, N. C., before Judge Frizzelle, holding the courts of the Fifth Judicial District, or other Judge lawfully presiding at the designated term of court, they, as counsel for defendant, would move and petition the court for an order setting aside the order of Judge Burgwyn, vacating the appeal entries allowed by him for the reasons stated in the application to set aside the withdrawal and abandonment of appeal, copy of which was attached to and made a part thereof, and that said motion and petition would be heard before the said Judge at certain time at the Regular May 1958 Criminal term of said court, or as soon after said date and time as counsel can be heard.

And the record shows that the Solicitor answered the application of defendant, and prayed that it be dismissed.

The cause coming on for hearing before Judge Frizzelle, upon the motion and petition aforesaid, and being heard upon affidavits filed and arguments made that under the provisions of G. S. 1-220 the Judge has authority to enter-

tain the motion. However, the Judge, being of contrary opinion, ordered the motion "dismissed for the reason that the court has no jurisdiction or authority under G. S. 1-220 to hear the motion, and that the defendant Grundler's sole procedure for relief is by application to the Supreme Court of North Carolina for a writ of certiorari."

The defendant excepted thereto, and appeals to the Supreme Court assigning error.

ATTORNEY GENERAL SEAWELL, ASSISTANT ATTORNEY GENERAL BRUTON, for the State.

GEORGE ROUNTREE, JR., HERBERT E. ROSENBERG, Member of New York Bar, for Defendant-Appellant.

EDWARD NORWALK, Member of Bar of U. S. Supreme Court, on brief.

WINBORNE, *C. J.*: This is the determinative question on this appeal: Did the Judge below err in dismissing application of defendant-appellant, on the ground that he had no jurisdiction or authority under G. S. 1-220 to hear the motion? The Court is of opinion and holds that that the ruling is erroneous.

In this State it is provided by statute G. S. 15-180 that "in all cases of conviction in the Superior Court for any criminal offense, the defendant shall have the right to appeal * * *; and the appeal shall be perfected and the case for the Supreme Court settled, as provided in civil action."

And the General Assembly declares that "the judge shall, upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment, order, verdict or other proceeding against him through his mistake, inadvertence, surprise, or excusable neglect * * *."

Considering these statutes in the light of decisions of this Court it is held that the judge of Superior Court to whom the application of defendant was addressed had the power and duty to hear the matter.

And it is uniformly held by decisions of this Court that where it appears that the judge below has ruled upon matter before him upon a misapprehension of the law, the cause will be remanded to the Superior Court for further hearing in the true legal light. See McGill v. Lumberton, 215 N. C. 752, 3 S. E. 2d 324, and cases cited including S. v. Fuller, 114 N. C. 886, 19 S. E. 797; S. v. Casey, 201 N. C. 629, 161 S. E. 81; Tickle v. Hobgood, 212 N. C. 762, 194 S. E. 461; Bullock v. Williams, 213 N. C. 320, 195 S. E. 791; Farris v. Trust Co., 215 N. C. 466, 2 S. E. 2d 363. See also numerous cases listed in Shepard's North Carolina Citations (215 N. C. 752, headnote 3).

For error pointed out this case is remanded for such further hearing.

Error and Remanded.

Filed January 14, 1959
In the Office of Clerk
Supreme Court of
North Carolina
Winborne, C. J.
Error and Remanded
No. 151

Appendix A

STATE OF NORTH CAROLINA

IN THE SUPERIOR COURT

COUNTY OF NEW HANOVER

March Criminal Term—1959

STATE,

v.

ROBERT J. GRUNDLER.

STATE,

v.

JOSEPH LEONID JELLY.

ORDER AND JUDGMENT

These causes coming on to be heard and being heard after due notice before Joseph W. Parker, Judge regularly holding the Courts of the Fifth Judicial District, at the March 1959 Criminal Term of Superior Court of New Hanover County, upon motion of the defendants Robert J. Grundler and Joseph Leonid Jelly, through their respective Counsel of record as hereinafter set out, to set Aside Order of Hon. W. H. S. Burgwyn, Emergency Judge, entered at the February-March 1958 Criminal Term of Superior Court of New Hanover County, in these causes vacating his Prior Orders allowing the defendants Robert J. Grundler and Joseph Leonid Jelly to appeal in forma pauperis to the Supreme Court of North Carolina, after giving due notice of appeal in open Court, and also vacating defendants Robert J. Grundler's and Joseph Leonid Jelly's appeal.

Appendix A

The defendants Robert J. Grundler and Joseph Leonid Jelly were represented in this hearing by their Attorneys, Messrs. Herbert E. Rosenberg, of the New York Bar, and Arthur P. Hartel, Jr., and George Rountree, Jr., of the North Carolina Bar; and the State of North Carolina was represented by Honorable John J. Burney, Jr., Solicitor of the Eighth Solicitorial District.

The Court, after hearing the evidence as appears in the record upon a consolidation of these two criminal actions for the purpose of this hearing, finds the following facts:

1. That on the 8th day of March, 1958, the Honorable W. H. S. Burgwyn sentenced the defendants Robert J. Grundler and Joseph Leonid Jelly, after a jury returned a verdict of guilty of rape with a recommendation of life imprisonment as to each defendant.

2. That upon the trial of the cause the defendant Robert J. Grundler was represented by the Honorable Aaron Goldberg, of the New Hanover County Bar, and the defendant Joseph Leonid Jelly was represented by the Honorable David Sinclair, of the New Hanover County Bar; that both attorneys, the Honorable Aaron Goldberg and the Honorable David Sinclair are outstanding, efficient and accomplished Counsellors at Law, possessing unquestionable integrity and ability, and at all times concentrated their legal efforts for the best interest of their client.

3. That upon the coming in of the verdict at the original trial as aforesaid, each Attorney on behalf of his client made the usual motions as appear in the record, which motions were overruled and Judgment entered as set out in Finding No. 1.

4. That thereafter Attorneys Goldberg and Sinclair, each on behalf of his client, excepted to the judgment and requested, and received, the usual entries of appeal.

5. That each defendant was allowed to appeal to the Supreme Court of North Carolina in forma pauperis, which also appears of record.

6. That thereafter, and within a period of approximately one hour, the defendant Robert J. Grundler, along with his father, William Henry Grundler, who had been present during the trial and participated in the conference with Attorney Goldberg and his son, the defendant, moved the Court to be permitted to withdraw his appeal, which withdrawal was allowed by the Court, after questioning the defendant Grundler in open Court, and after the defendant Robert J. Grundler, along with his father, William Henry Grundler, had signed a statement to his attorney, the Honorable Aaron Goldberg, specifically requesting that such motion for withdrawal of appeal be made before the Court by his Attorney Goldberg.

7. That this motion for withdrawal of appeal was made under protest by Attorney Goldberg, and against his advice, and after the defendant Robert J. Grundler, in the presence of his father, William Henry Grundler, had been fully advised of his rights in the matter of said appeal, as will appear from the evidence in this hearing.

8. That the defendant Joseph Leonid Jelly, along with his brother Raymond Jelly, who likewise had been present during the trial and participated in the conference with Attorney David Sinclair and his brother, the defendant, moved the Court to be permitted to withdraw his appeal, which withdrawal was allowed by the Court after questioning the defendant Joseph Leonid Jelly in open Court, and further the defendant Joseph Leonid Jelly, along with his brother Raymond Jelly, had signed a statement to his attorney, the Honorable David Sinclair, specifically requesting that such motion for withdrawal of appeal be made before the Court by his Attorney, Sinclair.

9. That this motion for withdrawal of appeal was made under protest by Attorney Sinclair, and against his advice, and after the defendant Joseph Leonid Jelly, in the presence of his brother Raymond Jelly, had been fully advised of his rights in the matter of said appeal, as will appear from the evidence in this hearing.

10. That it has been stipulated and agreed between Counsel for Moyants Robert J. Grundler and Joseph Leonid Jelly, and the Solicitor for the State, that the sole issue to be decided by this Court is whether or not under General Statutes 1-220 the said defendants should be relieved from the Judgment and Order entered by the Honorable W. H. S. Burgwyn, Emergency Judge, vacating the former Order of Appeal as appears of record through his mistake, inadvertence, surprise or excusable neglect.

The Court, upon the foregoing findings of fact, concludes that there was no mistake, inadvertence, surprise or excusable neglect in regard to the notice of appeal nor the withdrawal of said notice of appeal and appeal by the defendants, personally and through their Counsel, after being fully informed by said counsel of all the facts and circumstances surrounding said Orders, and fully comprehending and understanding the same.

WHEREUPON, IT IS ORDERED, CONSIDERED AND ADJUDGED that the motion of each defendant be, and it is hereby DENIED.

This 6th day of March, 1959.

/s/ JOSEPH W. PARKER,
Judge Presiding.

A True Copy

/s/ JAMES H. ADAMS,
Dep. Clerk Superior Court.

Appendix A

APPEAL ENTRIES

To the foregoing findings of fact and conclusions in the above Order and Judgment, the defendants Robert J. Grundler and Joseph Leonid Jelly, each for himself, objects and excepts as follows:

1. To Finding of Fact #7 for that, although the withdrawal of appeal was made under protest by Attorney Goldberg and against his advice and after the defendant Robert J. Grundler in the presence of his father, William Henry Grundler, had been fully advised of his rights in the matter of said appeal as found by the Court, the Court should have found, nevertheless, from the evidence in this hearing that Attorney Goldberg's protest and advice to the defendant Robert J. Grundler, in the presence of his father, William Henry Grundler, were not understood by the defendant Grundler, inasmuch as he was unable, due to his mental condition, to comprehend such advice or the effect of what was said to him by his attorney, nor was his father, William Henry Grundler, for the same reason, capable of understanding such advice or the effect of what was said to him concerning the withdrawal of the Notice of Appeal and the appeal of the defendant Robert J. Grundler.

2. To Finding of Fact #9 for that, although the withdrawal of appeal was made under protest by Attorney Sinclair and against his advice and after the defendant Joseph Leonid Jelly, in the presence of his brother, had been fully advised of his rights in the matter of said appeal as found by the Court, the Court should have found, nevertheless, from the evidence in this hearing that Attorney Sinclair's protest and advice to the defendant Joseph Leonid Jelly, in the presence of his brother, were not understood by the defendant Jelly, inasmuch as he was unable, due to his mental condition, to comprehend such advice or the effect of what was said to him by his attorney,

nor was his brother, for the same reason, capable of understanding such advice or the effect of what was said to him concerning the withdrawal of the Notice of Appeal and the Appeal of the defendant Joseph Leonid Jelly.

3. To the Court's conclusion upon the findings of fact "that there was no mistake, inadvertence, surprise, or excusable neglect in regard to the Notice of Appeal nor the withdrawal of said Notice of Appeal and the withdrawal of Appeal by the defendants personally and through their counsel after being fully informed by said counsel of all the facts and circumstances surrounding said Orders and fully comprehending and understanding the same," for that the Court should have concluded upon the evidence in this hearing that there was mistake, inadvertence, surprise or excusable neglect in regard to the withdrawal of said Notice of Appeal and Appeal by each defendant personally in that, although their counsel endeavored to inform them and defendant Jelly's brother and defendant Grundler's father of the facts and circumstances surrounding said Orders, neverthless, neither defendant comprehended nor understood the advice given them by their counsel or the effect of what they did, by reason of their mental condition at that time.

4. Upon the foregoing objections and exceptions and upon objection and exception of each defendant to the signing of the foregoing Order and Judgment, each defendant appeals to the Supreme Court of North Carolina; ntice of appeal given in each case in open court; further notice waived. Appeal bond fixed in each case at $100.00. Each defendant is allowed 90 days in which to make up and serve statement of Case on Appeal upon the Solicitor for the State; and in each case the Solicitor for the State is allowed 30 days after service of case on appeal to make

up and serve exceptions or countercase upon each defendant appellant.

Dated this 6th day of March, 1959.

/s/ JOSEPH W. PARKER,
Judge Presiding.

A True Copy

s/ JAMES I ADAMS,
Deputy Clerk Superior Court,

IN THE

SUPERIOR COURT

STATE OF NORTH CAROLINA

COUNTY OF NEW HANOVER

STATE OF NORTH CAROLINA,

Plaintiff,

v.

ROBERT JOSEPH GRUNDLER,

Defendant.

(ORDER AND JUDGMENT)

This cause coming on to be heard and being heard after due notice before Honorable J. Paul Frizzelle, Judge regularly holding the courts of the Fifth Judicial District at the June 1958 Criminal Term of Superior Court of New Hanover County, upon motion of the defendant, Robert J.

Grundler, through his attorneys Herbert E. Rosenberg and George Rountree, Jr., to set aside the Order of W. H. S. Burgwyn, E. J., entered at the February-March 1958 Criminal Term of Superior Court of New Hanover County in this cause vacating his prior Order allowing the defendant Robert J. Grundler to appeal in forma pauperis to the Supreme Court of North Carolina after giving due notice of appeal in open Court and also vacating defendant Grundler's appeal, and the cause being heard upon the affidavit of a New York psychiatrist, Dr. Richard H. Hoffmann, upon the issue whether or not the defendant Grundler and his father, both of whom signed the request to Judge Burgwyn to vacate his Order allowing the appeal in forma pauperis and permitting the appeal to be vacated on the ground that the defendant did not desire to appeal, were capable of knowing the effect of their acts and deeds; and upon objection by the Solicitor to the Court's consideration of the affidavit of the psychiatrist, Dr. Richard H. Hoffmann, the objection was sustained and the defendant Grundler excepted.

And the cause was also heard and argued upon the affidavit of George Rountree, Jr., appellate counsel and the several affidavits of Herbert Rosenberg, likewise appellate counsel, concerning errors committed by the trial court during the course of the trial in order to show meritorious cause in the defendant, movant;

And the court, during the course of the motion and argument in support of the motion, having inquired of counsel for the movant, Grundler, by what authority the court was being requested to set aside the prior order of Burgwyn, J., which vacated Judge Burgwyn's Order allowing the defendant to appeal to forma pauperis and also caused the appeal to be vacated, and the court having been informed by counsel for the defendant Grundler, the movant, that it had authority, in the opinion of counsel, under the provi-

sions of G. S. 1-220 to entertain the Motion to set aside the Order of Burgwyn, J., referred to; but the court being of a contrary opinion, and further being of the opinion that the proper procedure open to the defendant Grundler, was to apply to the Supreme Court of North Carolina for Certiorari in accordance with the applicable rules; and the Court finds the following facts:

That on the 8th day of March 1958, the Honorable W. H. S. Burgwyn sentenced the defendant to State Prison for the term of his natural life, after a jury returned a verdict of guilty of rape, with a recommendation of life imprisonment;

That thereupon the defendant gave notice of appeal to the Supreme Court, and sometime thereafter the defendant in open court, together with his father, withdrew said appeal; that notice of appeal was given on behalf of the defendant by Aaron Goldberg, his counsel, and the withdrawal of appeal was made on behalf of the defendant by and through his said counsel, Aaron Goldberg, at the request of the defendant and his father.

That thereafter, on the 8th day of March 1958, the Clerk of the Superior Court of New Hanover County issued a commitment for the above named defendant, and the defendant was carried to the State Prison in the City of Raleigh, North Carolina, and began the service of his sentence in accordance with the Judgment of Honorable W. H. S. Burgwyn, J.

NOW, THEREFORE, IT IS ORDERED, DECREED, AND ADJUDGED:

That the Motion of the defendant Grundler under the provisions of G. S. 1-220 set aside the Order of Burgwyn, J., which Order vacated a prior order of Judge Burgwyn allowing the defendant Grundler to appeal to the Supreme Court of North Carolina in forma pauperis and caused the appeal

to be vacated, and dismissed for the reason that the Court has no jurisdiction or authority under G. S. 1-220 to hear the Motion, and that the defendant Grundler's sole procedure for relief is by application to the Supreme Court of North Carolina for a Writ of Certiorari.

Dated this 10th day of June 1958.

J. PAUL FRIZZELLE,
Judge Presiding.

To the signing of the foregoing order and judgment the defendant Grundler excepts and appeals to the Supreme Court for errors to be assigned; notice of appeal was given in open court; further notice waived; appeal bond fixed at $100.00; defendant appellant allowed 30 days from the date hereof in which to make up and serve Statement of Case on Appeal, and the State is allowed 15 days thereafter to serve its exceptions or countercase.

Dated this 10th day of June 1958.

J. PAUL FRIZZELLE, *J.*

Appendix B

SUPREME COURT OF NORTH CAROLINA
FALL TERM, 1959
No. 145—New Hanover County

STATE

v.

ROBERT J. GRUNDLER

STATE

v.

JOSEPH LEONID JELLY

(JUDGMENT)

This cause came on to be argued upon the transcript of the record from the Superior Court New Hanover County: Upon consideration whereof, this Court is of opinion that there is no error in the record and proceedings of said Superior Court.

It is therefore considered and adjudged by the Court here that the opinion of the Court as delivered by the Honorable Clifton L. Moore, Justice, be certified to the said Superior Court, to the intent that the JUDGMENT IS AFFIRMED. And it is considered and adjudged further, that the defendants do pay the costs of the appeal in this Court incurred, to wit, the sum of Sixty-six and no/100 dollars ($66.00), and execution issue therefor.

A TRUE COPY.

ADRIAN J. NEWTON
Clerk of the Supreme Court.

By: /s/ SARAH G. BARBEE
Sarah G. Barbee,
Deputy Clerk.

(SEAL)

Appendix C

IN THE

SUPREME COURT OF THE STATE OF NORTH CAROLINA

STATE v. ROBERT J. GRUNDLER

No. 151, Fall Term, 1958

Appeal docketed	26 Aug. 1958
Case Argued	16 Sept. 1958
Opinion filed	14 Jan. 1959
Final Judgment entered	14 Jan. 1959

and

STATE v. ROBERT J. GRUNDLER and JOSEPH LEONID JELLY

No. 145, Fall Term, 1959

Appeal docketed	4 Aug. 1959
Case argued	22 Sept. 1959
Opinion filed	11 Nov. 1959
Final Judgment entered	11 Nov. 1959

I, ADRIAN J. NEWTON, Clerk of the Supreme Court of North Carolina, do hereby certify the foregoing Volume I, pages 1-110 inc., Volume II, pages 1-75 inc., Volume III, pages 1-356 inc. to be a full, true and perfect copy of the record and proceedings in the above-entitled case as the same now appear from the originals on file in my office.

I further certify that the rules of this Court prohibit filing of petitions to rehear in criminal cases.

In testimony whereof, I have hereunto set my hand and affixed the seal of the Supreme Court of North Carolina, this the sixth day of January, 1960.

ADRIAN J. NEWTON
Clerk of the Supreme Court of the
State of North Carolina

(SEAL)

Appendix D

Cross Reference Index

Submitted with the Petition for Writ of Certiorari herein are the following:

Vol. I—1st Appeal to Sup. Ct., N. C., filed Aug. 1958, decided January 1959.

Vol. II—2nd Appeal to Sup. Ct., N. C., filed Aug. 1959, decided Nov. 1959.

Vol. III—Petition for Writ of Certiorari in Supreme Court of North Carolina with exhibits submitted, filed August 1958, decided November 1959.

The original Stenographer's Minutes of Trial Record (March 1958, 269 pages) are referred to in Volumes I, II, and III above as T.R. or S.M. with reference to page number in typed minutes following.

The original Court Reporter's Hearing Record (March 1959, 113 pages) are referred to in Volumes II and III above as H.R. with reference to page number in typed minutes following.

To permit ready location of the aforesaid references in Volume III of above printed record, the following cross references are listed:

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Supreme Court of The United States

October Term, 1959

No. 672

ROBERT J. GRUNDLER and JOSEPH LEONID JELLY,

Petitioners,

v.

STATE OF NORTH CAROLINA,

Respondent.

BRIEF OF RESPONDENT, STATE OF NORTH CAROLINA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Supreme Court of The United States

October Term, 1959

No. 672

ROBERT J. GRUNDLER and JOSEPH LEONID JELLY,

Petitioners,

v.

STATE OF NORTH CAROLINA,

Respondent.

BRIEF OF RESPONDENT, STATE OF NORTH CAROLINA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

OPINIONS BELOW

This case was first passed upon by the Supreme Court of North Carolina at its Fall Term, 1958, and is reported as STATE v. GRUNDLER, 249 N. C. 399, 106 S. E. 2d 488. The Opinion of the Supreme Court of North Carolina appears also in Appendix A of the Petitioners' brief at pp. 20a - 24a.

At the Fall Term, 1959, the Supreme Court of North Carolina again passed upon this case, and the same is reported as STATE v. GRUNDLER and STATE v. JELLY, 251 N. C. 177, 111 S. E. 2d 1. The Opinion in the case also appears in the Appendix to Petitioners' brief at pp. 1a - 20a.

The Order and Judgment of the Superior Court of New Hanover County, which is a Court of general jurisdiction, and from which the Petitioners appealed to the Supreme

Court of North Carolina, where same was heard at the Spring Term, 1959, appears in the Appendix to Petitioners' brief at pp. 25a - 34a, and also appears in Volume II of the State Record certified to this Court, beginning at p. 22.

JURISDICTION

The Respondent, State of North Carolina, admits that a petition for re-hearing is not allowed in criminal cases in this State. The Petitioners invoke the jurisdiction of this Court under 28 USC 1257 (3) pertaining to Writs of Certiorari. The Respondent will endeavor to show later on in this brief that the validity of a statute of this State is not drawn in question as being repugnant to the Federal Constitution and that no title, right, privilege or immunity has been specially set up by the Petitioners or claimed by them under the Constitution of the United States.

CONSTITUTIONAL PROVISION INVOLVED

The Petitioners attempt to bring their case within a portion of the Fourteenth Amendment of the Constitution of the United States as quoted below:

"Constitution of United States, Amendment, Article XIV:

"* * * No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTES OF NORTH CAROLINA INVOLVED

"Sec. 1-220. *Mistake, surprise, excusable neglect.*—The judge shall, upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment, order, verdict or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect, and may supply an omission in any proceeding. The clerk may hear and pass upon

motions to set aside judgments rendered by him, whether for irregularity or under this section, and an appeal from his order on such motion shall lie to the judge at the next term, who shall hear and pass upon such motion de novo: Provided, however, nothing in this section shall be construed to affect the rights of innocent purchasers for value in foreclosure proceedings where personal service is obtained."

"Sec. 15-180. *Appeal by defendant to Supreme Court.*—In all cases of conviction in the superior court for any criminal offense, the defendant shall have the right to appeal, on giving adequate security to abide the sentence, judgment or decree of the Supreme Court; and the appeal shall be perfected and the case for the Supreme Court settled, as provided in civil actions."

"Sec. 15-181. *Defendant may appeal without security for costs.*—In all cases of conviction in the superior courts, the defendant shall have the right to appeal without giving security for costs, upon filing an affidavit that he is wholly unable to give security for the costs, and is advised by counsel that he has reasonable cause for the appeal prayed, and that the application is in good faith. Where the judge of the superior court has made an order allowing the appellant to appeal as a pauper and the appeal has been filed in the Supreme Court, and an error or omission has been made in the affidavit or certificate of counsel, and the error is called to the attention of the court before the hearing of the argument of the case, the court shall permit an amended affidavit or certificate to be filed correcting the error or omission.

"And where it shall appear to the presiding judge that a defendant who has been convicted of a capital felony, or having been tried upon a bill of indictment charging a capital felony, has been convicted of a less offense, and who has prayed an appeal to the Supreme Court from the sentence of death or other sentence pronounced against him upon such conviction, is unable to defray the cost of perfecting his appeal on account of his poverty, it shall be the duty of the county in which the alleged capital felony was committed, upon the order of such judge, to pay the necessary cost of obtaining a transcript of the proceedings had and the evidence offered on the trial from the court reporter for the use of the defendant and the necessary cost of preparing the requisite copies of the record and briefs which the defendant is required to file in the Supreme Court under the rules of said court.

'The judge may fix the reasonable value of the services rendered in furnishing such transcript and preparing such copies of the record and briefs, and said copies of the record and briefs shall be prepared in the manner prescribed by the rules of the Supreme Court in pauper appeals. Provided, that this paragraph shall apply only to those cases in which counsel has been assigned by the court."

QUESTIONS PRESENTED

The Respondent: State of North Carolina, submits the following as the questions presented by this Petition for Writ of Certiorari:

(1) Did the Petitioners draw in question, specially set up or claim any constitutional right, privilege or immunity guaranteed by the Fourteenth Amendment of the Constitution of the United States?

(2) Did the Petitioners properly raise any Federal Constitutional question according to State procedure and practice that was passed upon by the Trial Court and the Supreme Court of North Carolina?

(3) Were the Petitioners at any time during their trial deprived of any constitutional rights and was their trial infected with fundamental unfairness contrary to the provisions of the Fourteenth Amendment of the Constitution of the United States?

STATEMENT OF THE CASE

The Respondent, State of North Carolina, here gives a brief statement of the history of this case without any comment on the merits which is reserved for the argument, as follows:

(1) Petitioners Grundler and Jelly were indicted by the Grand Jury of New Hanover County, North Carolina, on February 1, 1958, for the rape of Opral Morris (Vol. II, pp. 37, 38; Vol. III, pp. 224, 225). Any references to Vols. I, II or III are made to the three volumes of the State Record certified by

the Clerk of the Supreme Court of North Carolina to the Clerk of the Supreme Court of the United States, and our references throughout this brief to the State Record so certified will be to one of these three volumes with the appropriate page number.

The Petitioners state in their brief that the indictments were consolidated for trial, which is true, but they also state that the Trial Court refused to grant a motion for separate trial but the Supreme Court of North Carolina which had the full trial record before it, states:

> "Defendants contend the Court was in error in consolidating the cases for trial. They insist there should have been a severance. The record does not disclose that defendants excepted to the consolidation or that they moved for a severance." (STATE v. GRUNDLER and STATE v. JELLY, 251 N. C. 177, 191; 111 S. E. 2d 1)

(2) Trial of the Petitioners before a judge and a jury was duly conducted, and on March 8, 1958, the Petitioners were convicted of the crime of rape with recommendation of life imprisonment (Vol. I, pp. 42-43; Vol III, p. 231). This being a capital offense under the law of North Carolina when the verdict is accompanied by a recommendation of life imprisonment it is mandatory that the judge give a sentence of life imprisonment instead of death.

(3) The Petitioners were represented by counsel of their own choice, the same being Mr. Aaron Goldberg and Mr. David Sinclair, and after the judgment and sentence of the Court counsel caused the appropriate motions and appeal entries to be entered in the record, and the Trial Judge signed orders allowing both Petitioners to appeal to the Supreme Court of North Carolina without paying any costs and ordered the County to pay for the necessary transcript of the record, evidence, and to pay the necessary costs of preparing the requisite copies of the record and the briefs which Petitioners are required to file under the Rules of the Supreme Court of North Carolina. In other words, the Petitioners were allowed to appeal to the highest court of the State with all necessary

records, transcripts and briefs and the cost of same being furnished free (Vol. I, pp. 43-52; Vol. III, pp. 231-239). The Court further ordered counsel to continue to appear for the Petitioners in the prosecution of the appeal.

(4) Thereafter, William Henry Grundler, the father of the Petitioner Robert J. Grundler, and the Petitioner Grundler, appeared before the Court and signed a written statement stating that they desired to withdraw the appeal which had been entered in the case in behalf of Robert J. Grundler (Vol. II, p. 14). Thereafter, Raymond F. Jelly, the brother of Petitioner Joseph L. Jelly, and Joseph L. Jelly, Petitioner, appeared before the Court and signed a statement that they desired the appeal to be withdrawn as to Joseph L. Jelly (Vol. II, p. 17). The Clerk of the Superior Court testified that he was present when Mr. Jelly and Mr. Grundler signed the withdrawal of their appeals and he asked them if they understood what they were signing and they said that they did. The Clerk also testified that he was present in the Court when the defendants were ordered to stand up and tell the Judge if they wished to abandon their appeals and that they apparently knew what they were doing (Vol. II, pp. 59-60). An account of all of these proceedings as to the withdrawal of the appeal will be found under the following references: Vol. I, pp. 43-51, Vol. II, pp. 10-17, and Vol. III, pp. 231-239. The evidence of Mr. Goldberg, who appeared for the Petitioner Grundler, as to the withdrawal of the appeal will be found reported in Vol. II, pp. 52-55; the evidence of Mr. David Sinclair, who represented Jelly, as to the withdrawal of the appeal will be found in Vol. II, pp. 55-59. The evidence of Goldberg, Counsel for Petitioner Grundler, and the evidence of Sinclair, Counsel for Petitioner Jelly, as well as the evidence of the prosecuting officer, John J. Burney, Jr., in question and answer form will be found in Vol. III, pp. 294-326.

(5) The trial judge, after examining Petitioners in open court, their counsel being present, ordered that the appeals be withdrawn, and thereafter the Petitioners filed an application to set aside this withdrawal and abandonment of appeal (Vol. I, pp. 2-8; Vol. III, pp. 240(1)-240(5)).

(6) The matter was heard and all the proceedings in connection with this motion or application are set out in Vol. I of the State Record certified to this Court, and on pp. 8-11 will be found the Order of the Judge of the Superior Court, entered the 10th day of June, 1958, from which it will be seen that the judge refused to hear the motion on the ground that he had no authority.

(7) Thereafter, the Petitioners appealed the matter to the Supreme Court of North Carolina, and the Supreme Court of North Carolina in an opinion entered on January 14, 1959 ruled that the Superior Court judge did have authority to hear the motion and to determine whether the order allowing withdrawal or abandonment of appeals should be set aside because of mistake, inadvertence or excusable neglect. This Opinion is found in the Appendix to Petitioners' brief, beginning on p. 20a.

(8) Thereafter, the matter was heard before another judge of the Superior Court, and all of these proceedings appear in Vol. II of the State Records certified to this Court. The Petitioners were fully heard before the trial judge, and the trial judge refused to set aside the order withdrawing and abandoning the appeals, and this order with its findings of fact will be found in Vol. II, pp. 22-28.

(9) From this order the Petitioners again appealed to the Supreme Court of North Carolina, and on the 11th of November, 1959, the Supreme Court of North Carolina filed its opinion upholding the order of the trial judge, and this opinion appears in the Appendix to the Petitioners' brief at pp. 1a-20a. Petitioners then filed this application for certiorari which is now before this court.

SUMMARY OF ARGUMENT

The Respondent, State of North Carolina, will argue that the Supreme Court of North Carolina did not pass upon or determine any Federal constitutional question but limited its decision to the issue stipulated and agreed upon by the

parties that "The only issue is whether or not the order revoking the order granting a right to appeal in forma pauperis, signed by the Hon. Burgwyn, J., should be set aside for mistake, inadvertence, surprise or excusable neglect." This stipulation appears on p. 31 of Vol. II; 1st paragraph of the State Record. Likewise, the trial court did not pass upon or determine any Federal constitutional question, and this is made clear by the tenth paragraph of the findings of fact made by the trial judge (see Vol. II, p. 25).

The Respondent will also argue that the Petitioners did not raise, specially set up, or draw in question, any right, privilege or immunity protected by the Federal Constitution. The first mention of a constitutional question is in the sixth Assignment of Error on p. 74 of Vol. II, and it is not based upon any exception reserved at the trial, and the trial court did not pass upon any Federal constitutional question, if, indeed, the simple assignment of error does not show what rights were infringed or in what manner.

The Petitioners filed a Supplemental Petition for a Writ of Certiorari in the Supreme Court of North Carolina on April 17, 1959, and in this Petition they asserted that Petitioners were deprived of their rights contrary to the Fifth and Fourteenth Amendments and that they were denied equal protection of the law but they did not allege in what manner this took place nor did they give any reasons (see Par. 24, Vol. III, p. 41).

Last of all, the Respondent will argue that the complete trial record shows that no constitutional rights of the Petitioners guaranteed by the Federal Constitution have been infringed at all but that the matter was tried according to the procedure and practice of the State of North Carolina, the Petitioners consciously and knowingly when accompanied by counsel and relatives withdrew their right of appeal and thereafter under the State practice attempted to have this withdrawal set aside.

ARGUMENT

I

THE PETITION REPRESENTS AN ATTEMPT ON THE PART OF THE PETITIONERS TO HAVE THIS COURT REVIEW THE MERITS OF THE STATE TRIAL.

This Court will notice from the statement of the case in the Petitioners' brief, beginning on p. 3, that the Petitioners go into the facts of the case and the merits and quote considerable evidence in question and answer form which they consider to be in their favor. The Petitioners also argue the question as to the competency of some of these questions and answers. All of this shows that Petitioners are trying to retry the case on its merits before this Court.

As to the merits of the case there was ample evidence to be submitted to the jury, and we only ask the Court, if it is interested in the merits, to read the evidence of the State in narrative form, beginning on p. 55 of Vol. I and extending to the middle of p. 66. The Supreme Court of North Carolina gives a succinct statement of the State's evidence in STATE v. GRUNDLER and STATE v. JELLY, 251 N. C. 177, 189. The State's evidence in question and answer form will be found, beginning on p. 46 of Vol. III and extending through p. 100. It is sufficient to say that there was ample evidence that the Petitioners, two marines stationed at Camp Lejeune, North Carolina, seized the prosecuting witness, a young woman whose husband was also a marine and was stationed overseas, forced her into their automobile, drove away, and each one committed an act of rape upon her. During the process of forcing her into the car, she screamed, and the scream was heard by two Air Force men; these two service men saw Jelly strike her and drag her into the car and immediately reported the matter to the police. As a result of the blows inflicted upon her the prosecuting witness had a swollen jaw, three loose teeth and her cheekbone was fractured in three places.

On p. 22 of Petitioners' brief Counsel for the Petitioners quote out of context statements made by the judge in his contentions for the State when instructing the jury. In order to be fair to the trial judge the whole charge should be read: it begins on p. 198 of Vol. III and extends to p. 223. This Court will see that beginning on p. 215 of this Volume the trial judge gave full contentions for the defendants to the effect that they had intercourse with the prosecuting witness with her consent, with further contentions as to their good character, as well as contentions as to their evidence that the prosecuting witness left the cafe with them voluntarily and voluntarily got into their automobile.

II

THE TRIAL COURT AND THE SUPREME COURT OF NORTH CAROLINA DID NOT PASS UPON OR DETERMINE ANY FEDERAL CONSTITUTIONAL QUESTION.

A casual reading of the two opinions of the Supreme Court of North Carolina will show that that Court did not pass upon or determine any Federal constitutional question. The first opinion, dated January 14, 1959, and reported as STATE v. GRUNDLER, 249 N. C. 399, 106 S. E. 2d 488, will show that the Supreme Court of North Carolina merely decided that under Sec. 1-220 of the North Carolina General Statutes the trial court did have jurisdiction to hear the application of the Petitioners, that the order of withdrawal of appeal should be set aside upon the grounds of mistake, inadvertence and excusable neglect. This is clearly a matter of State law and local State practice.

In the second opinion of the Supreme Court of North Carolina, reported as STATE v. GRUNDLER and STATE v. JELLY, 251 N. C. 177, 111 S. E. 2d 1, it is clear that the Supreme Court of North Carolina confined itself to the issue that was stipulated and agreed upon between the parties. This stipulation will be found in Vol. II, p. 31, and is as follows:

> "It was stipulated that the Defendant, Joseph Leonid Jelly, may adopt the original petition filed by Robert J. Grundler in the original cause and that the State may use the same answer as to Jelly as in the Grundler case, and it was further stipulated that the only issue is whether or not the order revoking the order granting a right to appeal in forma pauperis, signed by the Hon. Burgwyn, J., should be set aside for mistake, inadvertence, surprise or excusable neglect."

On p. 25 of Vol. II in the order and judgment of the trial judge this Court will see in Paragraph 10 of the Findings of Fact that this same stipulation is found as a fact by the trial judge.

Upon this theory of the case the Supreme Court of North Carolina in its opinion, which is now under review before this Court, said:

> "However, in this case the State and the defendants stipulated that the Court should inquire only as to whether the order of dismissal should be set aside for mistake, inadvertence, surprise or excusable neglect. It is clear that the parties brought themselves within the frame work of G. S. 1-220. The matter will be considered here upon the same theory as that adopted by the parties below. WADELL v. CARSON, 245 N. C. 669, 673, 97 S. E. 2d 222; PAUL v. NEECE, 244 N. C. 565, 570, 94 S. E. 2d 596."

On p. 187 of the official report of this opinion the Supreme Court of North Carolina comments on the fact that Petitioners did not raise any constitutional questions below, saying:

> "A careful scrutiny of the record discloses that no such question was raised in defendants' petition or at any time during the hearing below. This matter was injected for the first time on appeal. The assignment of error refers to no exception taken and to no ruling of the court. Furthermore, defendants entered into a stipulation at the hearing 'that the only issue is whether or not the order . . . should be set aside for mistake, inadvertence, surprise or excusable neglect.' * * *
>
> "The purported question was injected for the first time on appeal. The attempt to smuggle in new questions is

not approved. IRVINE v. CALIFORNIA, 347 U. S. 128, 129. Appellate courts will not ordinarily pass upon a constitutional question unless it affirmatively appears that such question was raised and passed upon in the trial court. STATE v. JONES, 242 N. C. 563, 564, 89 S. E. 2d 129. This is in accord with the decisions of the Supreme Court of the United States. EDELMAN v. CALIFORNIA, 344 U. S. 357, 358."

It is true that the Supreme Court of North Carolina did discuss the case of GRIFFIN v. ILLINOIS, 351 U. S. 12, 100 L. ed. 891, but this was merely for the purpose of saying that the case had no application. The Griffin Case, of course, could not apply because the trial judge ordered the Petitioners furnished with all necessary records without cost to them and ordered counsel to proceed to perfect the appeal; and, therefore, it would have no application because the Petitioners in a valid manner withdrew their appeal, and, therefore, waived such right.

The mere fact that the Supreme Court of North Carolina made reference to Petitioners' constitutional argument raised in the Supreme Court of North Carolina for the first time does not mean that the State Court decided a Federal question. This is clearly explained by Mr. Justice Holmes in the case of OSBORNE v. CLARK, 204 U. S. 565, 567-8, 51 L. ed 619, where the court of chancery appeals of the state clearly placed its decision on local state law but referred to the Dartmouth College Case as determinative of the fact that the educational institution was a private corporation. In that case this Court said:

> "The court of chancery appeals states the violations of the state Constitution set up in the bill, summarizes the questions presented by the bill and demurrer, and then addresses itself to answering those questions, suggesting no others, and saying nothing about the Constitution of the United States. After a statement of historical facts, it says that if the act authorizing the lease is constitutional, and the subject-matter of the act was under the control of the state, the case is at an end. If Carrick Academy is a public corporation, the state is assumed to have control. If it is a private corporation, the state Constitution is assumed to invalidate the statute by one of the clauses

set up in the bill. The judge, speaking for himself, would regard the academy as a public corporation, but he yields to the weight of the decision in the Dartmouth College Case, or, at least, to the principle of that case, according to which, as he conceives, the academy is a private corporation, and therefore exempt from a diversion from its original charter purposes, such as the act authorizing the lease is assumed to effect. The objections to such a diversion that he is considering are those that he has stated as presented by the bill. The supreme court, after stating the nature of the corporation and the relations and course of dealing of the state with it, and citing cases to prove that Carrick Academy is a public agency, *refers to the decision below and the citation there of the Dartmouth College Case only in order to show that that case was misapplied.* (Emphasis ours)

The same principle is adhered to by this Court in BLACK v. CUTTER LABORATORIES, 351 U. S. 292, 100 L. ed. 1188, 76 S. Ct. 824, where this Court held that the judgment of the state court rested on an adequate state ground irrespective of the reference to Federal decisions. In the Black Case this Court said:

"This Court, however, reviews judgments, not statements in opinions. Herb v. Pitcairn, 324 U. S. 117, 125, 126, 89 L. ed. 789, 794, 795, 65 S. Ct. 459; Morrison v. Watson, 154 U. S. 111, 115, 38 L. ed. 927, 929, 14 S. Ct. 995. See also Williams v. Norris (US) 12 Wheat. 117, 118, 120, 6 L. ed. 571, 572. At times, the atmosphere in which an opinion is written may become so surcharged that unnecessarily broad statements are made. In such a case, it is our duty to look beyond the broad sweep of the language and determine for ourselves precisely the ground on which the judgment rests. This means no more than that we should not pass on federal questions discussed in the opinion where it appears that the judgment rests on adequate state grounds. Herb v. Pitcairn (US) supra; Williams v. Kaiser, 323 U. S. 471, 477, 89 L. ed. 398, 403, 65 S. Ct. 363."

It is clear that the Supreme Court of North Carolina referred to the case of GRIFFIN v. ILLINOIS, supra, for the purpose of showing that counsel for petitioners had misapplied the case and that North Carolina had fully met its requirements. Likewise, the Court cited BROWN v. ALLEN,

344 U. S. 443, 97 L. ed. 469, 73 S. Ct. 397, for the purpose of showing counsel for the petitioners that his view or concept of GRIFFIN v. ILLINOIS, supra, had been misapplied in that the petitioners argued that this case stood for the principle that the petitioners were entitled to appeal at any time, whereas, BROWN v. ALLEN, supra, clearly held that a period of limitation beyond which appeals to a state supreme court could not be perfected was valid and constitutional.

Since the parties stipulated that the sole issue was whether or not the order revoking and declaring the appeal to be abandoned should or should not be set aside for mistake, inadvertence, surprise or excusable neglect and since the whole case was disposed of upon that issue it is clear that the judgment of the Supreme Court of North Carolina rests upon a nonFederal ground which is independent, adequate and tenable and that was not resorted to for the mere purpose of trying to evade Federal jurisdiction.

EUSTIS v. BOLLES, 150 U. S. 361, 370, 37 L. ed. 1011;

BEREA COLLEGE v. KENTUCKY, 211 U. S. 53, 53 L. ed. 81;

FOX FILM CORP. v. MULLER, 296 U. S. 207, 210, 80 L. ed. 158;

HERB v. PITCAIRN, 324 U. S. 117, 125-126, 89 L. ed. 789.

III

THE PETITIONERS DID NOT PROPERLY PRESENT ANY QUESTION AS TO THE DEPRIVATION OF CONSTITUTIONAL RIGHTS UNDER THE FOURTEENTH AMENDMENT BEFORE THE TRIAL COURT OR BEFORE THE SUPREME COURT OF NORTH CAROLINA.

When this matter was heard for the first time by the Supreme Court of North Carolina at its Fall Term, 1958 (STATE v. GRUNDLER, 249 N. C. 399, 106 S. E. 2d 488), it

is very clear that there was not even an attempt to present any constitutional question (see also Vol. I of the State Record). In the second hearing upon the sole stipulated issue as to whether the order withdrawing the appeal should be set aside because of surprise or excusable neglect the case was heard and again appealed to the Supreme Court. These proceedings have been certified to this Court as Vol. II. If the Court will examine Vol. II it will find that at no time was there presented to the trial court any Federal constitutional question or any allegation that Petitioners had been deprived of constitutional rights contrary to the Fourteenth Amendment because of fundamental unfairness in the trial. The first mention of any alleged deprivation of constitutional rights appears in the Petitioners' Assignments of Error, Paragraph No. 6, p. 74 of Vol. II, and this merely alleges a deprivation of liberty without due process of law and a denial of equal protection of the law all as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution. The same allegation was made in the Petition for Certiorari filed with the Supreme Court of North Carolina but this was merely an allegation, and when the case actually came before the Court we have a situation where the question appears for the first time in an assignment of error which was not based upon any exception or upon any ruling made by the trial court. The Supreme Court of North Carolina does not review constitutional questions unless they are properly raised and passed upon by the trial court (STATE v. JONES, 242 N. C. 563, 564, 89 S. E. 2d 129). It is believed that this Court has the same rule (EDELMAN v. CALIFORNIA, 344 U. S. 357, 97 L. ed. 387, 73 S. Ct. 293). As pointed out by the Supreme Court of North Carolina in its Opinion, this Court does not approve an attempt to smuggle in constitutional questions for the first time on an appeal (IRVINE v. CALIFORNIA, 347 U. S. 128, 129, 98 L. ed. 561, 74 S. Ct. 381).

It is beyond doubt that North Carolina's criminal code and its criminal procedure provide an adequate opportunity to raise constitutional questions since the procedure of North Carolina has been before this Court several times. There cannot be any question about the right of the Petitioners to raise

the question if they so desire, nor is there any showing in the Record that State officers prevented the Petitioners from raising such constitutional questions.

It is submitted, therefore, that all of these things must be raised in the courts below before this Court will give them consideration for this Court will only consider questions that have been adjudicated below. In WHITNEY v. CALIFORNIA, 274 U. S. 357, 47 S. Ct. 641, 71 L. ed. 1095, Mr. Justice Brandeis explained the reviewing power of this Court in his concurring opinion, as follows:

> "Our power of review in this case is limited not only to the question whether a right guaranteed by the Federal Constitution was denied (Murdock v. Memphis, 20 Wall. 590, 22 L. ed. 429; Montana ex rel. Haire v. Rice, 204 U. S. 291, 301, 51 L. ed. 490, 495, 27 Sup. Ct. Rep. 281); but to the particular claims duly made below, and denied (Seaboard Air Line R. Co. v. Duvall, 225 U. S. 477, 485-488, 56 L. ed. 1171, 1175, 1176, 32 Sup. Ct. Rep. 790). We lack here the power occasionally exercised on review of judgments of lower federal courts to correct in criminal cases with errors, although the objection was not taken in the trial court. Wiborg v. United States, 163 U. S. 632, 658-660, 41 L. ed. 289, 298, 299, 16 Sup. Ct. Rep. 1127, 1197; Clyatt v. United States, 197 U. S. 207, 221, 222, 49 L. ed. 726, 731, 732, 25 Sup. Ct. Rep. 429. This is a writ of error to a state court. Because we may not inquire into the errors now alleged, I concur in affirming the judgment of the state court."

In YAKUS v. UNITED STATES, 321 U. S. 414, 88 L. ed. 835, 64 S. Ct. 660, in speaking of the timely assertion of alleged constitutional rights, this Court said:

> "No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it. O'Neal v. Vermont, 144 U. S. 323, 331, 36 L. ed. 450, 455, 12 S. Ct. 693; Barbour v. Georgia 249 U. S. 454, 460, 63 L. ed. 704, 707, 39 S. Ct. 316; Whitney v. California, 274 U. S. 357, 360, 362, 380, 71 L. ed. 1095, 1099, 1100, 1107, 47 S. Ct. 641. Courts may for that reason refuse to consider a constitutional objection even

> though a like objection had previously been sustained in a case in which it was properly taken. Seaboard Air Line R. Co. v. Watson, 287 U. S. 86, 77 L. ed. 180, 53 S. Ct. 32, 86 ALR 174. While this Court in its discretion sometimes departs from this rule in cases from lower federal courts, it invariably adheres to it in cases from state courts, see Brandeis, J. concurring in Whitney v. California, supra (274 U. S. 380, 71 L. ed. 1107, 47 S. Ct. 641), and it could hardly be maintained that it is beyond legislative power to make the rule inflexible in all cases. Compare Woolsey v. Best, 299 U. S. 1, 81 L. ed. 3, 57 S. Ct. 2, with Ex parte Siebold, 100 U. S. 371, 25 L. ed. 717."

The rights, privileges, or immunities claimed must be set up in the State Court and denied by its decision.

BROOKS v. MISSOURI, 124 U. S. 394, 31 L. ed. 454;

HARTFORD LIFE INS. CO. v. JOHNSON, 249 U. S. 490, 63 L. ed. 722;

KEOKUK & HAMILTON BRIDGE CO. v. ILLINOIS, 175 U. S. 626, 44 L. ed. 299;

MUTUAL LIFE INS. CO. OF NEW YORK v. McGREW, 188 U. S. 291, 47 L. ed. 480;

PARKER v. McLAIN, 237 U. S. 469, 59 L. ed. 1051;

THOMAS v. IOWA, 209 U. S. 258, 52 L. ed. 782;

NEW YORK EX REL. COHN v. GRAVES, 300 U. S. 308, 81 L. ed. 666.

In PARKER v. McLAIN, 237 U. S. 469, 59 L. ed. 1051, on p. 471, it is stated:

> "Our jurisdiction to review the judgment of the highest court of a state turns upon whether a Federal right was specially set up or claimed in that court and denied by its decision."

A claim of jurisdiction in the Supreme Court of the United States to review a decision of a state court cannot be sustained by reference to briefs and statements which are not a part of the record.

ZADIG v. BALDWIN, 166 U. S. 485, 41 L. ed. 1087;

MEDBERRY v. OHIO, 24 How. 413, 16 L. ed. 739;

LYNCH v. NEW YORK, 293 U. S. 52, 79 L. ed. 191.

Of course, a state must furnish fair and reasonable procedure to raise Federal constitutional questions but when the state does furnish such procedure the appellants must use this procedure. This is made clear in the case of EDELMAN v. CALIFORNIA, 344 U. S. 357, 97 L. ed. 387, 73 S. Ct. 293, where this Court said:

> "It is clear that this Court is without power to decide whether constitutional rights have been violated when the federal questions are not seasonably raised in accordance with the requirements of state law. HULBERT v. CHICAGO, 202 U. S. 275, 50 L. ed. 1026, 26 S. Ct. 617 (1906); MUTUAL LIFE INS. CO. v. McGREW, 188 U. S. 291, 308, 47 L. ed. 480, 484, 23 S. Ct. 375, 63 LRA 33 (1903). Noncompliance with such local law can thus be an adequate state ground for a decision below."

Even if it can be said that the Petitioners raised a Federal question in the trial court, such question must be pursued on appeal to the State's highest court in the manner required by local State practice.

Under these circumstances we think the statement of the Court in the case of JOHN v. PAULLIN, 231 U. S. 583, 585, 58 L. ed. 381, 383, is appropriate. This Court there said:

> "Without any doubt it rests with each state to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of local or general law."

See also:

C. I. O. v. McADORY, 325 U. S. 472, 477, 89 L. ed. 1741;

PARKER v. ILLINOIS, 333 U. S. 571, 92 L. ed. 886;

CENTRAL UNION TEL. CO. v. EDWARDSVILLE, 269 U. S. 190, 70 L. ed. 229;

C. & O. R. CO. v. McDONALD, 214 U. S. 191, 53 L. ed. 963;

HARDING v. ILLINOIS, 196 U. S. 78, 49 L. ed. 394.

In TARRANCE v. FLORIDA, 188 U. S. 519, 47 L. ed. 572, it was held that where the State practice required a plea in abatement instead of a motion to quash that this Court would follow the State practice.

In BAILEY v. ANDERSON, 326 U. S. 203, 207-7, 90 L. ed. 3, this Court said:

> "Inspection of the record does not show that, in denying the writ of error, the state court passed upon any constitutional question not raised or passed upon in the course of the proceedings below. Such appears not to be its practice. Rule 22 of the Rules of the Supreme Court of Appeals, 181 Va lxxv; cf. Ward Lumber Co. v. Henderson-White Mfg. Co. 107 Va. 626, 628, 629, 59 S. E. 476, 17 LRA (NS) 324; Bliss v. Spencer, 125 Va. 36, 50, 99 S. E. 593, 5 ALR 619; Reynolds v. Adams, 125 Va. 295, 314, 99 S. E. 695. On this record we cannot say that the interest claimed was not included in the award, or, if it was not, that the Supreme Court of Appeals of Virginia, by denying writ of error, passed upon any question of the constitutionality of such denial of interest, not raised on the record or passed upon below. Unless this affirmatively appears upon the record brought here for review on appeal, this court is without jurisdiction of the appeal. Jacobi v. Alabama, 187 U. S. 133, 135, 136, 47 L. ed. 106-108, 23 S. Ct. 48; Mutual L. Ins. Co. v. McGrew, 188 U. S. 291, 309, 47 L. ed. 480, 485, 23 S. Ct. 375, 63 LRA 33; Chicago, I & L. R. Co. v. McGuire, 196 U. S. 128, 131, 49 L. ed. 413, 415, 25 S. Ct. 200. See Flournoy v. Wiener, 321 U. S. 253, 262, 263, 88 L. ed. 708, 714, 715, 64 S. Ct. 548, and cases cited."

In WILLIAMS v. GEORGIA, 349 U. S. 375, 99 L. ed. 1161, this Court said:

> "A state procedural rule which forbids the raising of federal questions at late stages in the case, or by any other

than a prescribed method, has been recognized as a valid exercise of state power."

See, also, the following cases:

LAYTON v. MISSOURI, 187 U. S. 356, 47 L. ed. 214;

MORRISON v. WATSON, 154 U. S. 111, 38 L. ed. 927;

BALDWIN v. KANSAS, 129 U. S. 52, 32 L. ed. 640;

BROOKS v. MISSOURI, 124 U. S. 394, 31 L. ed. 454;

SPIES v. ILLINOIS, 123 U. S. 131, 31 L. ed. 80.

We will not burden this brief with further discussion of this question, but we do refer the Court to certain cases which sustain our position that the State Court must be given an opportunity to pass upon constitutional questions before this Court will charge it with any errors in regard to such matters.

See:

UNITED STATES v. SPECTOR, 343 U. S. 169, 72 S. CT. 591, 96 L. ed. 863;

SPIES v. ILLINOIS, 123 U. S. 143, 8 S. Ct. 21, 31 L. ed. 80;

BROOKS v. MISSOURI, 124 U. S. 394, 8 S. Ct. 443, 31 L. ed. 454;

BALDWIN v. KANSAS, 129 U. S. 52, 9 S. Ct. 193, 32 L. ed. 640;

MORRISON v. WATSON, 154 U. S. 111, 14 S. Ct. 995, 38 L. ed. 927;

ERIE R. CO. v. PURDIE, 185 U. S. 148, 22 S. Ct. 605, 46 L. ed. 847;

LAYTON v. MISSOURI, 187 U. S. 356, 23 S. Ct. 137, 47 L. ed. 214;

LOUISVILLE & N. R. CO. v. WOODFORD, 234 U. S. 46, 34 S. Ct. 739, 58 L. ed. 1202;

WILSON v. COOK, 327 U. S. 474, 66 S. Ct. 663, 90 L. ed. 793;

WILLIAMS v. GEORGIA, 349 U. S. 375, 99 L. ed. 1161, 75 S. Ct. 814;

PARKER v. ILLNOIS, 333 U. S. 571, 92 L. ed. 886, 68 S. Ct. 708;

PENNSYLVANIA R. CO. v. ILLINOIS BRICK CO., 297 U. S. 447, 462, 463, 80 L. ed. 769;

BAILEY v. ANDERSON, 326 U. S. 203, 90 L. ed. 3, 66 S. Ct. 66.

IV

THE PETITIONERS WERE NOT DEPRIVED OF ANY CONSTITUTIONAL RIGHTS GUARANTEED BY THE FOURTEENTH AMENDMENT IN THE TRIAL OF THEIR CAUSE.

As we previously pointed out, the tenor of Petitioners' allegations and brief in support of same seems to be that they wish this Court to review the whole State trial and pass upon the rulings of the State trial judge as to the competency or incompetency of evidence and the legality of the trial court's statement of contentions and instructions to the trial jury. The Petitioners in their statement of the case repeatedly quote questions and answers which they say were improperly admitted or questions which they say were improperly ruled upon as to the answers. They find fault also with the trial court's instructions. Let it be said at once that there is no evidence whatsoever of a hostile atmosphere surounding the trial of the Petitioners. In fact, two members of the Air Force testified against Petitioners while other members of the Marine Corps testified or were offered as witnesses in their favor. We cannot escape the fact that the prosecuting witness was cruelly treated, beaten, had three loose teeth and her cheekbone was fractured in three places. The two witnesses that belonged to the Air Force saw these blows inflicted. The chief complaint, therefore, of the Petitioners

is really not that they were deprived of any constitutional rights but that they were caught, convicted and sentenced to prison.

We have never thought that it was the function of this Court to pass upon the competency of evidence in state trials or the validity of a trial court's instructions. There is an exception as to confessions which is not involved here.

The very same point as raised by the Petitioners in this case was decided by this Court in BUCHALTER v. NEW YORK, 319 U. S. 427, 87 L. ed. 1492, 63 S. Ct. 1129, where this Court said on this point, the following:

> "The petitioners insist that the rulings upon evidence and instructions to the jury, when taken in their totality, indicate that, whatever the intention of the trial judge, his rulings and attitude precluded a fair consideration of the case. The Court of Appeals held that certain of the challenged rulings and instructions were erroneous but that the errors were not substantial in the sense that they affected the ability of the jury to render an impartial verdict, and that others of the alleged errors were not such under the law of New York. As already stated, the due process clause of the Fourteenth Amendment does not enable us to review errors of state law however material under that law. We are unable to find that the rulings and instructions under attack constituted more than errors as to state law. We cannot say that they were such as to deprive the petitioners of a trial according to the accepted course of legal proceedings."

In AMERICAN RAILWAY EXPRESS CO. v. KENTUCKY, 273 U. S. 269, 71 L. ed. 639, it is said at p. 273:

> "It is firmly established that a merely erroneous decision given by a state court in the regular course of judicial proceedings does not deprive the unsuccessful party of property without due process of law."

Errors of a state court in interpreting and applying the laws of that state furnish no basis for the claim that there has been a denial of due process of law guaranteed by the Fourteenth Amendment to the Federal Constitution. The

Constitution of the United States does not guarantee that the decisions of state courts shall be free from error or require that their pronouncements shall be consistent.

DAVIS v. TEXAS, 139 U. S. 651, 35 L. ed. 300;

HOWARD v. KENTUCKY, 200 U. S. 164, 50 L. ed. 421;

WORCESTER COUNTY TRUST CO. v. RILEY, 302 U. S. 292, 82 L. ed. 268;

MILLER v. TEXAS, 153 U. S. 535, 38 L. ed. 812;

CARTER v. ILLINOIS, 329 U. S. 173, 91 L. ed. 172.

When a state court judicially determines that there is sufficient evidence of a fact to be submitted to a jury, its decision is not reviewable by the United States Supreme Court on writ of certiorari.

NOBLE v. MITCHELL, 164 U. S. 367, 41 L. ed. 472;

AMERICAN RAILWAY EXP. CO. v. KENTUCKY, 273 U. S. 269, 71 L. ed. 639;

BELL TELEPHONE CO. v. PENNSYLVANIA PUBLIC UTILITY COMMISSION, 309 U. S. 30, 84 L. ed. 563.

In BELL TELEPHONE CO. v. PENNSYLVANIA PUBLIC UTILITY COMMISSION, 309 U. S. 30, 32, 84 L. ed. 563, it is stated in a *per curiam* opinion:

> "As to the first contention, it appears that the state court heard the appeal judicially and decided that there was evidence justifying the finding of the Commission of unreasonable discrimination in the transaction of its intrastate business. In the absence of other constitutional objections, it cannot be said that a state court denies due process when on appropriate hearing it determines that there is evidence to sustain a finding of the violation of state law with respect to the conduct of local affairs. The contention that such a decision is erroneous does not present a federal question."

The following paragraph from the opinion of Justice White

in NOBLE v. MITCHELL, 164 U. S. 367, 373, 41 L. ed. 472 would seem to be decisive of the question:

> "It is suggested that there is no adequate proof that the policy in controversy was issued by a foreign corporation. This involves a mere question of fact, which was submitted to the jury by the trial court, and as to which the Supreme Court of Alabama said there was evidence sufficient for the consideration of the jury, and which is not subject to review here on writ of error. DOWER v. RICHARDS, 151 U. S. 659 (38:306); RE BUCHANAN, 158 U. S. 31 (39:884)."

If it should be determined that the Supreme Court of North Carolina erroneously decided the case, no question would be presented for determination by this Court for it has long been held that where a party is fully heard in the regular course of judicial proceedings, an erroneous decision of the state court is not a denial of due process within the Fourteenth Amendment of the Constitution of the United States.

BONNER v. GORMAN, 213 U. S. 86, 53 L. ed. 709;

AMERICAN RAILWAY EXPRESS CO. v. KENTUCKY, 273 U. S. 269, 71 L. ed. 639;

WEST OHIO GAS CO. v. PUBLIC UTILITIES COMMISSION, 294 U. S. 63, 79 L. ed. 761.

CONCLUSION

This case may be summarized as follows: The Petitioners, knowingly and consciously in open court and by signing a written statement, waived their right to appeal and asked that they be allowed to abandon their appeal. The Petitioners and their relatives had decided that if they perfected their appeal and gained a new trial they would again be tried for a capital offense which might result in death, and they did not wish to take such a chance. It was only after the father of one of the petitioners and the brother of the other petitioner had returned to their home state that they consulted other counsel and then changed their minds as to the course of action they had previously taken. The waiver made by Petition-

ers meets all the requirements of this Court, as stated in JOHNSON v. ZERBST, 304 U. S. 458, 464, 82 L. ed. 1461, and JENNINGS v. ILLINOIS, 342 U. S. 104, 109, 96 L. ed. 119, 72 S. Ct. 123. The same rule prevails in North Carolina as shown by MILLER v. STATE, 237 N. C. 29, 48, 74 S. E. 2d 513. The appeal was withdrawn under the strict requirements of the North Carolina practice as shown in STATE v. LEAK, 90 N. C. 655, and the trial judge was careful to see that the Petitioners not only advisedly consented to but desired and directed that their appeals be withdrawn.

We submit, therefore, that this Application for Certiorari does not raise any substantial Federal question; in fact, it raises no Federal question at all, and the same should be dismissed.

Respectfully submitted,

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